# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]159

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THE FIRST NATIONAL BANK OF AIKEN, PETITIONER,

*vs.*

THE J. L. MOTT IRON WORKS.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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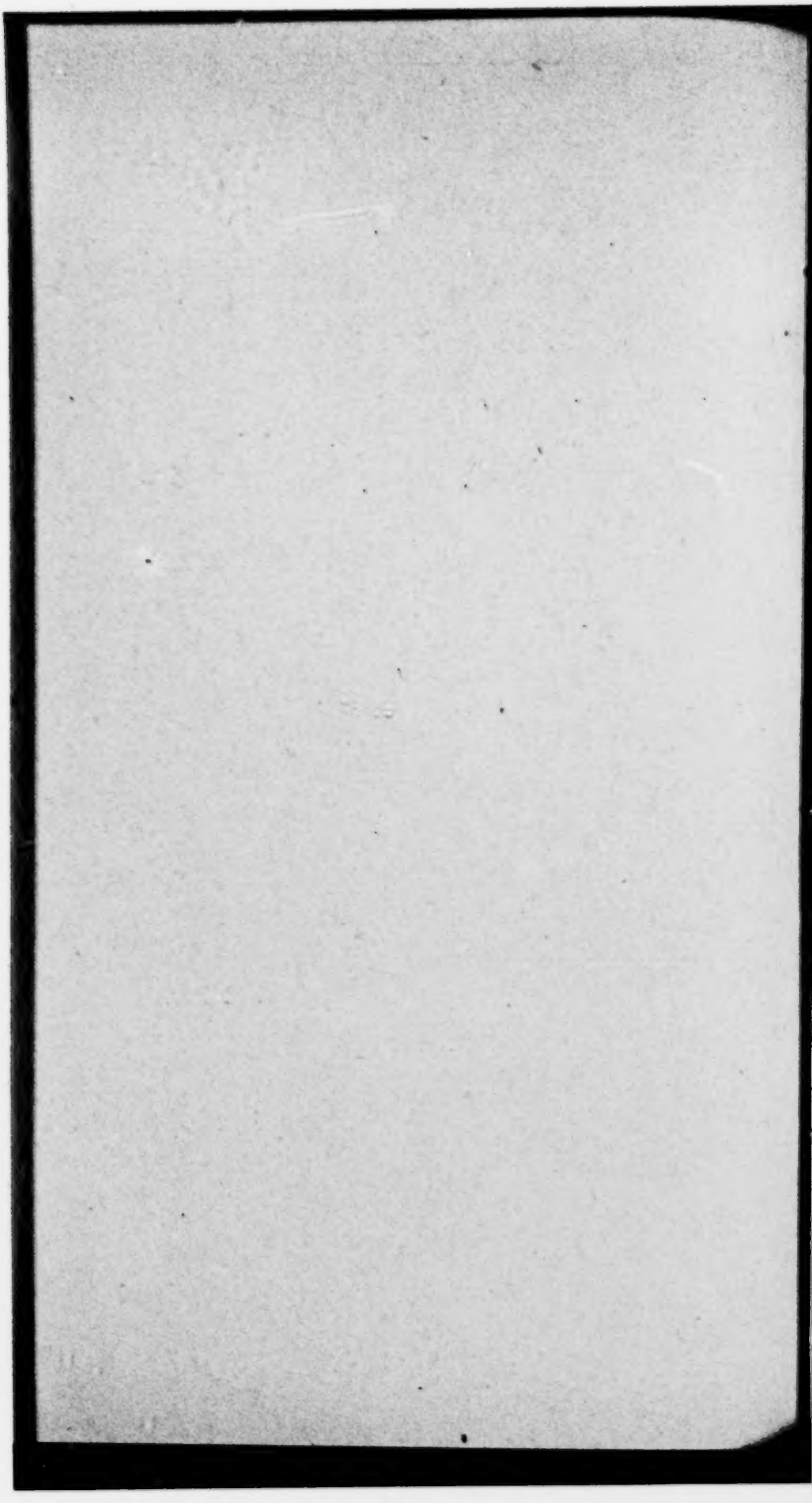
PETITION FOR CERTIORARI FILED OCTOBER 25, 1920.

CERTIORARI AND RETURN FILED DECEMBER 11, 1920.

(27,951)



(27,951)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1920.**

# No. 594.

THE FIRST NATIONAL BANK OF AIKEN, PETITIONER,

*vs.*

THE J. L. MOTT IRON WORKS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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1 Ex. A. H. Mc C.

STATE OF SOUTH CAROLINA:

In the Supreme Court, Spring Term, 1920.

THE J. L. MOTT IRON WORKS, Respondent,

against

THE KAISER COMPANY and FIRST NATIONAL BANK, Appellants.

Appeal from Aiken County.

Hon. J. S. Wilson, Judge.

Hendersons, for respondent.
John F. Williams and D. W. Gaston, for appellants.

*Complaint.*

The complaint of the plaintiff respectfully shows to the Court:

1. That the plaintiff is a corporation duly chartered under the laws of the State of New Jersey, and as such has power to sue and be sued in the Courts of the State of South Carolina. That the defendant, Kaiser Company, is a corporation duly chartered under the laws of the State of South Carolina, and doing business now or formerly in the city of Aiken, county of Aiken, and State
2 of South Carolina, and has its business residence therein, and as such may be sued and may sue in the Courts of Common Pleas of Aiken county, South Carolina. That First National Bank is a banking corporation, chartered under the laws of the United States of America, does business in the city of Aiken, county and State aforesaid, and as such may be sued in the Court of Common Pleas of Aiken county, South Carolina.

2. That heretofore, to wit, on October 15, 1916, on December 13, 1916, on December 16, 1916, on January 16, 1917, and on January 29, 1917, the plaintiff sold and delivered to the defendant, Kaiser Company, its agents and representatives, f. o. b. Trenton, N. J., various articles of plumbing fixtures and materials and merchandise, a full itemized statement and list whereof is hereto appended as "Exhibit A" of this complaint, at and for an agreed price of twenty three hundred and sixty-five dollars and fifty cents ($2,365.50).

3. That no part of the said agreed price for the said fixtures, materials and merchandise above referred to has been paid, although long overdue.

4. That before the sale and delivery of the above set out fixtures, fittings and merchandise by the plaintiff to the defendant, Kaiser

Company, the defendant, First National Bank, in writing guaranteed and agreed legally and with due authority to become responsible for any pay, in consideration of the sale and delivery of the said merchandise, fixtures and goods to Kaiser Company, the whole amount of said bill, namely, the specified and agreed sum of twenty-three hundred and sixty-five dollars and fifty cents ($2,365.50). That said bill thereby, and from other circumstances, became an account stated, bearing interest from its due date, namely, thirty days after each shipment was made, and that therefore the First National Bank is responsible, and is due this plaintiff, with Kaiser Company, the sum of twenty-three hundred and sixty-five dollars and fifty cents ($2,365.50), the amount of said bill, with interest thereon amounting to two hundred and twenty-one dollars and eighty-one cents ($221.81), calculated to the 31st day of July, 1918, at the legal rate, and with interest thereafter at the legal rate upon the principal sum of twenty-three hundred and sixty-five dollars and fifty cents ($2,365.50) from the said 31st day of July, 1918.

Wherefore, plaintiff demands judgment against the defendant, Kaiser Company, and First National Bank of Aiken, jointly and severally, for the sum of twenty-three hundred and sixty-five dollars and fifty cents ($2,365.50), and for the sum of two hundred and twenty-one dollars and eighty-one cents ($221.81), interest down to and inclusive of the 31st day of July, 1918, and for interest thereafter at the rate of seven per cent per annum, upon the principal sum of said debt, and for the costs and disbursements of this action.

HENDERSONS,
*Plaintiff's Attorneys.*

Aug. 14th, 1918.

New York, N. Y., August 10, 1918.

Kaiser Company to the J. L. Mott Iron Works, F. O. B. Trenton, N. J.

1916.

| | | | |
|---|---|---|---|
| Oct. 25. | 1 | Pl. 3083-A Puritita comb. cast brass floor drain and trap. | |
| | 1 | Pr. rough brass ¾" compr. valves w/ n. p. brass bonnets, loose key stems and escts. valves to set in wall to control the supply to flushing rim of drain, less piping. | |
| | | Net in proportion to quotation..... | $32.90 |
| 4 | | | |
| Dec. 13. | 4 | V. A. syphon jet West Point W. cs. with sanitary perfect screw connections for lead pipe. | |
| | 4 | Hvy. pol. oak seats with N. P. hinges, no covers. | |
| | 4 | #39 oak Cisterns w/1-3/8" gooseneck valve. | |
| | 4 | Pr. n. p. #2 brass brackets. | |
| | 4 | N. P. Brass flush pipes. | |
| | 4 | N. P. #6 guide hardwood pull and chain. | |

Pl. 476-H.

11 V. A. prompto Sano water closets, with sanitary perfect screw connections for lead pipe.
11 Hvy. pol. oak seats with n. p. hinges, no covers.
11 #39 oak Cisterns w/1-3/8" gooseneck valve.
11 Pr. n. p. brass brackets.
1 N. P. brass flush pipes.
11 N. P. #6 guide hardwood, pull and chain.

Pl. 476-H.

3 Beekman galv. iron sinks 30x20" with integral back and galv. legs.
3 Pr. Harlem n. p. 5/8" compr. faucets, cold with hose, and
3 N. P. 2" cast brass half S. trap.

Pl. 7300-E.

1 Beekman porc. enam. iron sink 30x20" w/ integral back.
1 Simplex concealed hanger.
1 Pr. Harlam N. P. 5/8" compr. faucets, cold w/hose, and
1 N. P. 2" cast brass half S trap.
1 Porc. enam. iron drain board, size 25x17", with porc. enam. iron brackets as shown.

Pl. 7300-A.

2 Porc. enam. iron all roll-rim Layton Baths, with exterior fin. white, size 5'6".
2 Sets of N. P. Bronx supply and waste fittings, n. p. 1/2" iron pipe size supply pipes to follow w/ esets.
2 Sets claw and ball feet, as shown plate 2685½-A. Fittings located one right and one left hand facing.

Pl. 2685-A.

7 Porc. enam. iron Euclid Baths, to build into back and one end wall, porc. enam. exterior, size 5'6½".
7 Sets n. p. Bronx supply and waste fittings, w/. n. p. 1/2" iron pipe size supply pipes to follow w/ estes.
Fittings located five right and two left end facings.

Pl. 2701-A as Des.

2 Porc. enam. iron drain boards, size 25x17", w/ proc. enam. iron brackets, as shown in Pl. 7300-A, to fit two Beekman galvd. iron sinks.

Net in proportion to quotation..... $1,044.60

Dec. 16. 1 N. P. 3½" tubular shower, w/ N. P. mixing valve w/ loose key shut off valves to wall, Pl. 3044½-A as des.
1 N. P. offset curtain rod w/ wall flanges and snaps, with white duck curtains.
1 Imp. porc. selected Class "B" 39x40 Receptor, with 5" waste strainer and 3" coupling.

Pl. 3021-A.

4 Tremont imp. porc. Class "A" Lavas, 24x22".
4 Pr. porc. enam. iron legs with n. p. wall supports.
4 N. P. #2 wastes.
4 Pr. 3-8" n. p. supply pipes to wall with stop valves, iron pipe size.
6 4 N. P. 1½" adj. traps w/ iron pipe size nipple to wall and escut.

Pl. 95-H.

3 Tremont imp. porc. Class "A" Lava, 27x24".
3 Pr. proc. enam. iron legs and w/ n. p. wall supports.
3 N. P. Gooseneck w/ removable rose spray.
3 N. P. clover knee action supply valves.
3 N. P. pipes from valve to gooseneck.
3 N. P. clover knee action wastes.
3 Pr. n. p. supply pipes to wall w/ stop valves.
3 N. P. 1½" adj. traps to wall w/ iron pipe size nipple to wall and escut.

Pl. 64-H.

8 Veritas vit. china Lavas, 20x19", with integral backs and wall supports.
8 Vit. center standards and dowels.
8 N. P. #2 Nassau wastes.
8 Pr. N. P. ⅜" iron pipe size supply pipes to wall w/ stop valves.
8 N. P. 1½" adj. traps w/ iron size pipe, nipple to wall with escuts.

Pl. 4328-E.

1 Brunswick imp. porc. Pantry sink with int. back and drain board, and
1 Pr. imp. porc. legs and cross bars.
1 Belknap n. p. #4 comb. faucet w/ china name plates.
1 Simplex standing waste and overflow.
1 Set of wood mats for sink and drain board.
1 N. P. 2" S. adj. trap.
Class "A."

Pl. 7068-A.

1 Imp. porc. Class "A" roll-rim Hanover Slop Sink w/ integral back, size 24x22".
1 3" bronzed iron full S trap Standard, no vent. hub. outlet for lead waste.
1 N. P. cast brass waste plug w/ bar strainer.
1 Pr. N. P. 3/8" Harlem Compr. faucets, flanged for 3/4" iron pipe w/ china name plates, hot and cold.

Pl. 7506-A as Des.

2 Tremont imp. porc. Class "A" Examination room Lavas, size 27x24".
2 Proc. enam. iron legs and w/ n. p. wall supports.
2 N. P. gooseneck w/ removable rose spray.
2 N. P. clover knee action supply valves.
2 N. P. pipes from valve to gooseneck.
2 N. P. clover knee action wastes.
2 Pr. n. p. supply pipes to wall w/ stop valves.
2 N. P. 1½" adj. traps to wall w/ iron pipe, size nipple to wall and escts.

Pl. 64-H.

3 Vit. Clinic Slop sinks fitted w/.
3 Spuds.
3 N. P. Cleansing jets.
3 Vit. trap standards.
3 Sets of brass bolts w/ porc. bolt caps.
3 Rough brass floor flanges for lead waste.
3 N. P. combined standards and jet supply.
3 N. P. brass 3/4" double compr. faucets and comb. valves for jet supply with 3/4" iron pipe, size supply pipes to floor, 2/ valve to control supply to flushing rim w/ n. p. 1½" lower bond and escts.

8 Pl. 40-H as Des.

W/ fittings as B/P. 1709 submitted, only supplies to floor. Two of above for Utensil Room and one for Operating Room.
2 Aluminum fin. bronzed iron utensil racks, each to hold two bed pans and four urinals.
1 Veritas Nurses' Room Sink, vit. china lava, 24x19", w/ integral back and wall supports.
1 Vit. china center standard.
1 N. P. #2 Nassau waste.
1 Pr. n. p. Acme push button faucets w/ china name plates.
1 Pr. n. p. 3/8" iron pipe size supply pipes to wall w/ stop valves.
1 1½" n. p. adj. trap w/ iron pipe size nipple to wall and esct.

Pl. 4329-A.

2 Rocona imp. pore. Class "A" Kitchen sinks, w/ integral back.
2 Pr. Pore. legs and bars.
2 N. P. Bleknap comb. supply faucets w/ china name plates.
2 N. P. 2" adj. traps w/ iron pipe size nipple, to wall and esct.

Pl. 7054-A.

1 Hale Imp. pore. Class A Surgeon's Sink, 42x24x7".
1 Pr. pore. enam. iron legs and wall supports and bars.
1 N. P. Goo-eneck w/ extra large rose spray.
1 N. P. clover knee action supply valve.
1 N. P. pipe from knee action to gooseneck.
1 Pr. n. p. supply pipes to wall w/ stop valves.
1 N. P. clover knee action waste.
1 N. P. 2" adj. trap to wall, w/ 6" inlet.

9 Pl. 134-H.

1 Set of four Wentworth imp. pore. Class B Wash Tubs w/ integral back, size 31".
4 Pr. impr. pore. legs and bars.
2 wringer bases.
4 N. P. stoppers, and
4 Pr. n. p. compr. 5/8" faucets w/ china name plates.
1 N. P. 2" continuous waste and 2" trap to wall and esct.

Pl. 7602-A.

| | | |
|---|---|---|
| | Net in proportion to quotation..... | $1,191.45 |
| 1917. | | |
| Jan. 16. | 4 Pr. N. P. Bronx compr. faucets.<br>8 Pr. N. P. Bronx compr. faucets w/ china name plates. | |
| | Net in proportion to quotation..... | $25.80 |
| Jan. 29. | 4 30" ash drain boards with n. p. hinges and telescopic legs, size 36x26". | |

Pl. 7054-A.

| | |
|---|---|
| Net ..... | $70.75 |
| Total ..... | $2,365.50 |

*Recapitulation.*

Invoiced as follows:

| | | |
|---|---|---|
| October | 25/16..... | $32.90 |
| December | 13/16..... | 1,044.60 |
| December | 16/16..... | 1,191.45 |
| January | 16/17..... | 25.80 |
| January | 29/17..... | 70.75 |
| Making total ..... | | $2,365.50 |

10 To the foregoing complaint which was served on the appellants, the following answer of the Kaiser Company was served:

*Answer of Kaiser Company.*

The defendant, Kaiser Company, answering the complaint herein, alleges:

For a First Defense.

1. Except as to the matters hereinafter admitted this defendant denies the allegations of the complaint contained, and demands strict proof thereof.

For a Second Defense and Counterclaim.

1. That plaintiff is a corporation duly chartered under the laws of the State of New Jersey, and as such, has power to sue and be sued in the Courts of the State of South Carolina, and defendant is a South Carolina corporation, with its officers and offices at Aiken, where it may sue in any Court of competent jurisdiction.

2. That sometime during the year 1916, plaintiff and this defendant (who will be referred to hereinafter as defendant) entered into an agreement whereby plaintiff was to sell and deliver to defendant a certain complete and entire contract of plumbing material for the Aiken Hospital, and agreed to deliver the same at Aiken immediately, that is by a certain day, just a short time hence from the making of said contract, when it would be necessary for defendant to install same according to its contract for the installation of the plumbing; that the plaintiff agreed to transport and deliver the entire contract to this defendant at Aiken by that day, and plaintiff was fully informed of the disastrous consequences that would result to this defendant financially (all of which are set out hereinbelow) in case it failed to carry out the aforesaid agreement, and
11 upon those express representations, this defendant entered into this agreement with plaintiff, it being distinctly understood that time was the essence of the contract.

That notwithstanding the aforesaid agreement, which induced defendant to order the material for which plaintiff makes claim, yet nevertheless plaintiff failed and refused to ship the merchandise as agreed, but shipped pieces and parcels of the order from time to time, in such a manner as to make its performance worse than no performance whatever, and failed and refused to ship to this defendant nearly one-half of the entire order sued on; and as a result of plaintiff's failure, this defendant, which was a small corporation, could not perform its contract to the Aiken Hospital, and had its employees in idleness for a long time, sent its various representatives to other cities than Aiken, where it was necessary for them to go to purchase such of the parts as were ordered from the plaintiff, to try to perform its contract with the Aiken Hospital for installing the plumbing; that it was entirely necessary for the defendant to carry on its work by agreed stages or periodically, in order that defendant may obtain certain payments from its contract, which payments it could not receive if the work had not advanced to a certain stage; and because of the failure and refusal on the part of the plaintiff to perform its agreement, this defendant could not perform its agreement, and amongst other things it resulted that this defendant having paid out great sums to its employees, who remained idle to await the arrival of the order from plaintiff, and having gone to great expense in preparing to take care of the contract of the Aiken Hospital, insolvency overtook this defendant and its resulting damage as aforesaid and in telegrams and freight and passenger travel made necessary to try to complete its contract, amounted to more, along with the other items of damage sustained by this
12 defendant, than the sum sued for, to wit, two thousand nine hundred and seventy-five ($2,975.00) dollars.

Wherefore, defendant prays that the complaint be dismissed and for judgment in the sum of two thousand nine hundred and seventy-five ($2,975.00) dollars.

JOHN F. WILLIAMS,
*Defendant's Attorney.*

The First National Bank served the following answer:

*Answer of First National Bank of Aiken.*

The defendant, First National Bank, answering the complaint herein, not waiving the right to demur, but especially reserving the same, respectfully shows unto the Court:

For a First Defense.

1. That it has not sufficient information to admit the allegations of the complaint, and it therefore denies the same.

For a Second Defense.

1. That this defendant is informed, believes and alleges that a contract was entered into between the plaintiff and Kaiser Company, whereby plaintiff was to sell and deliver to said defendant at Aiken sufficient material and merchandise (the delivery to be immediate) for said defendant to install same within a specified time in the hospital at Aiken; and this defendant is further informed, believes and alleges that plaintiff undertook said delivery, and that plaintiff represented that it had all the goods, wares and merchandise contracted for on hand ready for shipment at the time; but that after having taken the order and so agreed, said plaintiff refused to ship unless the payment therefor was guaranteed; this defendant alleges that one officer of the bank (which is a National Bank, under U. S. banking laws) did undertake to guarantee the payment of
13 the bill for immediate shipment, and upon the express representation that the entire contract was ready for shipment, and would be shipped at once; but that all said representations were untrue and so known to the plaintiff, and the contract was not shipped immediately, although plaintiff and defendant were fully cognizant of the urgency of immediate shipment, and the great loss that would ensue to the principal defendant; and notwithstanding the express contract on which said officer undertook to guarantee any bill of plaintiff that said merchandise would be shipped at once, nevertheless the plaintiff failed to ship immediately the merchandise, and the plaintiff did not ship the order of merchandise ready packed and in its ware rooms for shipment, as it agreed to do, but on the contrary shipped first one little part and then another for weeks and months, and failed to cause the entire order to be delivered as it agreed to do, and made it absolutely impossible for said officer of this bank to protect himself against any guaranty, on account of the failure of its codefendant to complete its contract without great loss of money and time, all of which plaintiff had full knowledge of, from which great damage flowed.

2. That the aforesaid false statements and false promises of the plaintiff and the debt of defendant, Kaiser Company, were not brought to the attention of this defendant until considerably more

than a year after the transaction described in the preceding paragraph; the long lapse of time making it impossible for said officer of the bank or for defendant to protect any interest it may have; but on the contrary, all opportunity to protect itself has gone beyond defendant's control, on account of the insolvency of this defendant's codefendant, and if any judgment is obtained against this defendant by the plaintiff as guarantor, it would be utterly helpless to reimburse itself as against its codefendant, Kaiser Company, having become insolvent and gone out of business, this defendant is informed, believes and alleges, because of the failure of the plaintiff to fulfill its contract aforesaid, and therefore, plaintiff is estopped from asserting such guaranty (which this defendant does not admit) against this defendant.

For a Third Defense.

1. This defendant alleges that the officer of this defendant bank (which is a National Bank, under U. S. banking laws) who undertook to guarantee the payment of the bill described in the complaint, was informed at the time that the shipment was ready in its entirety, then packed and ready to be delivered to the transportation company, and that it was upon this express representation and promise on the part of the plaintiff that he undertook to guarantee payment of the bill; but this defendant alleges that the goods were not so prepared for shipping, and the goods were not really so shipped, but they were sent along from time to time, and some never did arrive, according to the information and belief of this defendant, although it was the duty of the plaintiff to deliver the goods at Aiken within a reasonable time thereafter.

2. This defendant further alleges that the foregoing paragraph of this defense sets out the facts under which plaintiff claims this defendant to be liable, and it denies that it has ever been liable to plaintiff under the laws applicable to said transaction, and under the laws of the United States, for the indebtedness of its codefendant, and denies that it can be held so liable, or that plaintiff has any authority for claim of liability on the part of this defendant, on account of such alleged guaranty.

Wherefore, this defendant demands judgment that the complaint be dismissed as to it with costs.

JOHN F. WILLIAMS,
D. W. GASTON, JR.,
*Defendant's Attorneys.*

The plaintiff replied.

*Statement.*

The case came on for trial at the October term of the Court at Aiken, on the 21st and 22d days of November, 1919, and resulted in a verdict for the plaintiff for $2,739.42. From the judgment de-

fendants duly appealed; the following is the plaintiff's testimony in substance, which bears on the questions involved on appeal:

Plaintiff's counsel read in evidence the following stipulation signed by both defendants, to wit:

"That each defendant waives any objection to the present action being maintained against them jointly instead of Kaiser Company being sued first as principal and First National Bank of Aiken later as guarantor, but reserves all other legal rights upon the subject with the privilege of asserting them in this action, the same as if the defendants had been sued separately."

Plaintiff's counsel read into the record, by the consent of defendant's counsel, the following stipulation of counsel: "It is agreed that 'Kaiser Company' was duly incorporated by the Secretary of State of South Carolina on the 22d of August, 1916, its capital stock being $1,000, and it possesses the usual powers given to business corporations under the law, including the power to sue and be sued,—and that such shipments of plaintiff as were received at destination were received by the corporation, 'Kaiser Company.'"

16 Plaintiff's counsel introduced in evidence, by consent, the original order herein dated July 21, 1916, received as Exhibit "B" and hereinafter set out.

Plaintiff's counsel, by consent, read into the record the following stipulation of counsel: "It is stipulated that Mr. Koen, of Hoppin & Koen, would testify that the letter of Hoppin & Koen, dated September 13, 1916, with attached revised description of fixtures, was transmitted to the plaintiff corporation from Hoppin & Koen, who were the architects in charge of the Aiken Hospital job, and who had authority as such architects to specify the articles which should be used in such hospital, and change the same from time to time."

Plaintiff's counsel then offered in evidence the aforesaid letter, received as Exhibit "2" and hereinafter set out.

Plaintiff's counsel, by consent, offered in evidence a telegram dated December 2, 1916, to J. L. Mott Iron Works from First National Bank, received in evidence as Exhibit "3" and hereinafter set out.

GEORGE A. DUNBAR, sworn, says:

I am cashier of the defendant bank and the telegram marked Exhibit "3" was sent by me to the plaintiff on December 2, 1916, and in reply I received letter of December 4, 1916, which is received in evidence and marked Exhibit "Q," in reply to which I wrote a letter which is produced, received in evidence and marked Exhibit "R." In March, 1917, I received a letter, which is received in evidence as Exhibit "GG," to which a statement was attached.

Q. Now, I have served you with a notice to produce a certain paper which I understand is the contract between Kaiser Co. and McGhee & McGhee, contractors, and assigned to the bank,—have you such a paper in your possession as indicated?

A. Yes, sir.

17 Q. May I see it?
A. Yes, sir, you may.

(Witness hands counsel the paper asked for.)

Mr. Henderson: I desire to offer this paper, produced by the defendant, cashier, in evidence.

Mr. Williams: That does not seem to be an agreement between either of the parties to this suit. The H. B. Kaiser Company was not the Kaiser Company. The H. B. Kaiser Company was a co-partnership, existing prior to the organization of the incorporation known as Kaiser Company, and McGhee & McGhee are not parties to this suit. It appears to be a paper furthermore that the witnesses were not present.

The Court: It says in the presence of D. H. Epps and some Ford.

Mr. Williams: But my friend has not proven the execution of the paper. That is a paper between H. B. Kaiser Company, and that concern was a copartnership, and McGhee & McGhee, in which the J. L. Mott Company is not mentioned even, and it has no relevancy whatever in this case, and has not been proven to be relevant.

Mr. Henderson (continuing):

Q. Well, before I go further, Mr. Durban, I will ask you a question—you are familiar with the hospital are you not?
A. Yes, sir.
Q. It has been built and completed?
A. Yes, sir.
Q. And McGhee & McGhee were the contractors?
A. Yes, sir.
Q. They built it, didn't they?
A. Yes, sir.
Q. And Kaiser Company put the plumbing in?
A. I don't know whether it was Kaiser Company or H. B. Kaiser Company.
Q. That paper on the back is assigned to the First National Bank—can you tell me—your guarantee was on December 2, 1916—can you tell me how long before your guarantee that paper was
18 assigned to the bank, approximately?
A. It is a question in my mind whether it was before or after.
Q. Before or after the guarantee?
A. Yes, sir.
Q. If it was before, about how long before was it?
A. I don't remember.
Q. Was it in a comparatively short time?
A. I cannot say.
Q. You would not say about the time?
A. No, sir.

Mr. Henderson: Now, if your Honor please, the paper is a contract between McGhee & McGhee and H. B. Kaiser Company for

putting in the plumbing in the Aiken Hospital. The evidence is that the Kaiser Company was incorporated on the 22d of August, 1916, after the date of the contract, and the contract was assigned by Weatherford or Kaiser as vice president, showing that they were then acting as a corporation, and this paper is produced out of the defendant (bank) itself, and it is a paper that is not required to be witnessed, and hence we are not bound to show its execution as in a deed or will. It is produced out of the possession of the bank, and the evidence is that the First National Bank made this guarantee. The question of the guarantee of the bank may be of vital importance in this case, and now we have gotten this paper, which is a contract assignment, and hence when they make a guarantee to get goods with it to do the plumbing, then the paper is necessary in that view of the case.

Mr. Williams: We just take the position that that paper has no connection whatever with the J. L. Mott Iron Works. They are promised nothing under that paper. The further point is that that was a copartnership that entered into this agreement with McGhee & McGhee, and even if it was assigned to the bank, if it gave no benefit to the Mott Company it would not be relevant here.

19 The Court: "I think the paper should go in, and I am going to let you offer it."

(Admitted as Exhibit "4" and read to the jury.)

Witness continued: The Kaiser Company had made arrangements with our bank to borrow money to do the work at the hospital. We furnished them some money. The assignment was made when the sum of money was loaned; it had no connection with the guarantee. The assignment was made at the time the money was loaned.

At the suggestion of plaintiff's counsel, witness was excused for the purpose of going to the bank to consult certain records which were necessary to make his statement more definite, the witness having been subpœnaed only upon the morning of the trial.

The witness returned after a space of an hour and was examined as follows:

GEORGE A. DURBAN (again takes the stand).

Examination.

By Mr. Henderson:

Q. Have you found when the first loan was made to Kaiser Company?
A. Yes, sir.
Q. Give us that date, please?
A. August 16, 1916.
Q. When was that next one?
A. August 28, 1916.
Q. What is next?
A. There was another one on September 5, 1916.

Q. Any others?

A. Yes, sir, there was another one on September 14, 1916, another on October 4, 1916, another on October 13, 1916, and still another on October 16, 1916. Let me explain now for a minute. The loan on September 5, 1916, was renewed by the loan of October 4, 1916, and that explains that latter loan.

Q. Those were all of the loans made to Kaiser Company on this proposition?

A. I cannot say that they were on this contract. I cannot remember those things.

20 Q. They are all of the loans that were made?

A. Yes, sir.

Q. They total how much?

A. About fifty-two hundred dollars.

Q. How much in loans did you make?

A. I have just told you.

Q. I don't mean with renewals—how much in actual loans did you make?

A. About $4,700.

Q. In new loans?

A. Yes, sir.

Q. All loans had been made before the guarantee was made, had they not?

A. Yes, sir.

Q. The guarantee was on December 2d?

A. Yes, sir.

Q. $4,700 had been loaned to Kaiser Company on the hospital proposition before the 2d day of December, 1916?

A. Yes, sir.

Q. Then having refreshed your memory you say that undoubtedly this paper had been assigned to the bank before December 2, 1916?

A. It was assigned on August 16, 1916, I find.

Q. The paper, then, was assigned to the bank on August 16, 1916?

A. Yes, sir.

Q. The date of the first loan?

A. Yes, sir.

Q. They say in the answer here that you made this guarantee on your own motion as cashier of the bank, is that correct, or did you have instructions from some one else?

A. I talked the matter over with the president.

Q. Mr. D. W. Gaston?

A. Yes, sir.

Q. Did you two gentlemen together decide to do it together?

A. As well as I remember.

Q. And he is the president of the bank?

A. Yes, sir.

Q. You distinctly recall having a conversation with Mr. Gaston as to whether the guarantee should be made or not, you say?

A. It is my custom to do that before acting on a matter of this kind.

21 Q. Did you follow that in this instance?

A. I presume so. I never make a guarantee without consulting him.

Q. You would not have made a guarantee of this kind without consulting him?

A. No, sir.

Q. And you consulted, and then you gentlemen decided to make the guarantee?

A. Yes, sir.

Q. You knew that lavatories, water tanks and all kinds of plumbing fixtures were necessary to go into this hospital for the completion of the job?

A. I felt that the entire contract or order of the goods was necessary.

Q. You knew when you made the guarantee that in order for these men to complete this contract which they had assigned to you gentlemen as special security for forty-seven hundred dollars worth of loans, that they had to have this shipment from the Mott Company in order to complete this job?

A. It seems so.

Q. You have no objection to that statement?

A. It seems that way to me.

Q. And to come down to brass tacks that is the only job the bank could have had in view in making this guarantee to Mott Company?

A. We did that to help Kaiser Company.

Q. And the contract was assigned to the bank?

A. Yes, sir.

Q. And they did owe some of this borrowed money when the guarantee was made?

A. Yes, sir, they would pay up part of the loans and new loans would be made.

Q. When the guarantee was made the Kaiser Company did owe the bank some amount?

A. Yes, sir.

Q. And be that amount big or little this paper was the protection for the amount that was owing,—it was the security for it?

A. It was security to the loans.

Q. It was security for the running loan that you made to Kaiser Company to do the hospital job?

A. It was collateral security to the loans.

22 Q. Something was said about deposits, did you find that Kaiser Company was running a deposit with you during this period?

A. Yes, sir.

Q. When did it begin?

A. August 16, 1916.

Q. That is when it started?

A. Yes, sir.

Q. The same date that they opened up their account with a loan?

A. Yes, sir.

Q. And they kept a deposit with you continuously up to and beyond the time of the guarantee on December 2, 1916?

A. Yes, sir.
Q. That is true?
A. Yes, sir.
Q. You have some notes there?
A. No, sir, I only have the record of them.

Cross-examination.

By Mr. Williams:

Q. Does the Kaiser Company owe the bank now?
A. Yes, sir.
Q. The money that was had did not pay up the indebtedness of the bank?
A. We still have a loan to them.
Q. They still owe you?
A. Yes, sir.
Q. Do you remember about what amount it is?
A. On November 5, 1916, it was $608.
Q. And that is still owing?
A. Yes, sir; with interest.
Q. It, of course, would amount to more than that now?
A. Yes, sir.
Q. On the 16th of August, 1916, you say that contract was assigned to the bank?
A. Yes, sir; apparently so.
Q. That was assigned to the bank to secure loans to whom?
A. To Kaiser Company.
Q. Did this paper or not have anything to do with this Mott account?
A. No, sir.

Mr. Oliveros, an officer of the Kaiser Company, came to me with a telegram from plaintiff to McGhee and stated that this stuff was ready for shipment, and that it had to be guaranteed before he could get it out; that was the sense of it. After I got this
23 information from Mr. Oliveros and while he was standing there with that telegram in his hand, I sent in the telegram guaranteeing the account. I don't know how long it was after that, but I think it was sometime during the same day.

I know the hospital job was delayed and the Kaiser Company forbid our paying the claim. The representatives of the Mott Iron Works came to me from the Mott Iron Works and it seems to me that he said something about the government coming in and taking anything they wanted to caused the breaking up of all kinds of contracts and that in a measure was the cause of some of the delay.

This matter of guaranteeing the bill was never placed before the board of directors, and they have never approved it.

Redirect examination:

When the bank accommodates a customer it helps the bank. When the guarantee was made this paper (the contract between

Kaiser Company and McGhee) was in possession of the bank and the Kaiser Company owed a loan and this paper was the security for it.

On the back of this paper was endorsed the transfer and agreement by McGhee to make all checks on the contract to the bank. The bank had that agreement in its possession. We had McGhee made checks payable to the bank as far as we could get them.

Q. "Don't you know that you permitted him, either by positive acquiescence or activity, to make several checks direct to Kaiser Company?

A. I think he did do it.

Q. And you agreed to it?

A. Yes, sir.

Q. That is true, is it not?

A. It is."

Q. And after the date of the guarantee you agreed that he should make special checks to Kaiser Company?

24 A. I think that there was some special checks that were made direct to Kaiser Company.

Q. And you agreed to it later on?

A. Yes, sir.

Q. I show you a paper in your handwriting and dated March 19, 1917,—that is the paper in which you ratified McGhee & McGhee having made these checks payable to the order of Kaiser Company?

A. Yes, sir.

Q. That was your intention in making that paper?

A. Yes, sir.

Q. It was to ratify the fact that McGhee had made checks direct to Kaiser Company?

A. Yes, sir.

Q. And that was done?

A. Some were made; yes, sir.

Mr. Henderson: I offer this paper agreeing to and ratifying the act of McGhee in making these checks as outlined in evidence.

(Above paper offered in evidence by the plaintiff and marked Exhibit 5 by the Stenographer.)

Mr. Henderson (continuing):

Q. This is the paper that you gave to McGhee?

A. Yes, sir.

Q. It is on the bank's stationery, and I got it out of his possession?

A. That is right.

Q. Now, then, after that paper was signed waiving the making of the checks for two thousand dollars, another for four hundred and sixty-eight dollars, and another for three thousand dollars, in favor of the bank,—didn't McGhee & McGhee then make and give to you this check for $1,105.28?

A. Yes, sir.

Q. That is the check that was given to you (handing the check to the witness)?

A. Yes, sir.

Q. I have added these figures up,—please check them over with me, $468, and $2,000 and another for $3,000, and then this check that they gave you for $1,105.28,—how much is that?

A. It is $6,573.28.

Q. $6,573.28 is the amount realized on this contract?

A. I suppose so.

Q. The amount of this contract assigned to you, in which McGhee & McGhee agreed to make all checks payable to the First National Bank was $7,800?

A. Yes, sir.

Q. That is correct, is it not?

A. I think it is.

Q. Then take that amount off of the $7,800, and see how much it would leave?

Q. What amount do you mean?

A. Take the amount of the checks that passed, and see what the balance would be?

A. $1,373.28.

Q. Have you made any effort to collect that out of McGhee & McGhee or anybody?

A. No, sir.

Q. In addition to this assignment of the hospital contract have you any other securities from Kaiser Company for the amount of these loans?

A. We have the indorsement from Mr. L. M. C. Oliveros.

Q. Have you made any effort to avail yourself of that indorsement?

A. No, sir.

Q. Anything else?

A. Not as I know of.

Q. You took that contract,—did you take any other contract from anybody?

A. We have taken other securities.

Q. I mean as security for the Kaiser Company debts?

A. No, sir.

Q. That is the only thing?

A. Yes, sir.

Q. Any contract of Kaiser with anybody?

A. No, sir.

Mr. Henderson: I offered in evidence this check for $1,105.28, dated July 7, 1917, in favor of the First National Bank of Aiken, and signed by McGhee & McGhee.

(Check as above marked Exhibit 6, and introduced in evidence.)

Plaintiff's counsel then read into the record, by consent, the agreed testimony of Carl Feidler, Howard Nutt, Oscar Barth, Edward Houser, Edward Fallon, Nicholas Welsh, George Banner,

Charles Smith and William Schraeder, all employees of the
26 plaintiff company, and all upon points which were not disputed by defendant's testimony, to the effect that the books of the plaintiff thoroughly agree with the account sued on and attached to the complaint. (Production of books waived.)

To the further effect, as proven by most of the aforesaid employees of the plaintiffs, who are packers, checkers and shipping clerks, that the goods ordered by the defendant, Kaiser Company, were shipped in the following shipments, to wit:

1st. On October 25, 1916, the articles listed under that date on the bill attached to the complaint, were packed and shipped from Trenton, N. J., f. o. b. Trenton.

2d. As to the articles listed under date of December 13, 1916, upon the bill attached to the complaint, said testimony showed the original freight bill, being produced, that the articles as listed packed in fifty crates, boxes and bundles, were shipped from Trenton, N. J., f. o. b. Trenton, N. J., on December 11, 1916; as part of said testimony there was introduced in evidence the original packing sheets made out in ordinary course of business by a packer of the plaintiff company and checked by a checker, upon which is listed in full each of the articles referred to and which shows the packing of all of said articles on the 20th of October, 1916. The testimony as to this shipment further comprised a statement from the shipping clerk in charge of the same that he received orders from the New York office on December 4, 1916, to forward this shipment, but was unable to obtain a freight car at the works on account of the congested condition of freights until December 11, 1916, when said shipment was promptly made.

3d. As to the articles listed upon the bill attached to the complaint under date of December 16, 1916, said admitted testimony tended to show the shipment of said articles from Trenton, N. J., f. o. b. Trenton, N. J., on December 6, 1916, the same being
27 contained in numerous packages, boxes, bundles, barrels and crates, and as part of said testimony there was offered the original packing sheets made out by a packer of the plaintiff company at its pottery, and checked by its checker, in which was listed as being actually packed and checked, all of the articles referred to—said packing sheet showed the packing and checking of said articles on the 27th of November, 1916.

4th. As to the articles listed on the bill attached to the complaint under date of January 16, 1917, said testimony tended to show the shipment of said articles listed from Trenton, N. J., f. o. b. Trenton, N. J., on January 12, 1917; the original invoice and the original packing sheet was introduced in evidence.

5th. As to the articles listed on the bill attached to the complaint under date of January 29, 1917, said admitted testimony tended to show, with the introduction of the original freight bill and the original packing sheets, the shipment of said articles from Trenton, N. J., f. o. b. Trenton, N. J., on January 25, 1917.

6th. In addition to the articles set out in the bill attached to the complaint, said admitted testimony tended to show the shipment on the 2d of February, 1917, from Trenton, N. J., f. o. b. Trenton, N. J., of one Vitrious Veritas Lavatory and one Galvanized Iron Beckman Roll Rim Sink.

It is agreed that the printing of said testimony in full and of the articles in detail, which the packing sheets purport to show were packed and shipped, is waived, it being stipulated, however, that said packing sheets purport to show the packing and shipping of every article listed on schedule attached to complaint.

All shipments were made to "Kaiser Company;" the testimony explained the fact that the billing in practically every in-
28 stance, was a few days later than the actual shipment, as the shipment was done at Trenton, N. J., and the billing was later made up in the office of the plaintiff.

At this point the plaintiff rested and counsel for the defendant, bank, made a motion for a nonsuit as to the bank upon the ground that it was a National Bank and the action on the guarantee could not be maintained for the reason that the bank could not become a guarantor of bills in mercantile transactions, being unauthorized by the United States Statute, and that it could refuse to perform any time it saw fit, and that one who takes a guarantee from a National Bank cashier, who cannot in such case bind the bank, takes it with that notice under the law.

The Court overruled the motion, saying:

"It is for the jury to say what benefit the bank got out of the transaction."

*Defendant's Testimony.*

L. M. C. OLIVEROS, upon being shown the memorandum of agreement between McGhee & McGhee and H. B. Kaiser Company, dated the 16th of August, 1916, said that it was between H. B. Kaiser and W. H. Weatherford, a copartnership, and McGhee & McGhee, and that he had no connection with that copartnership; that it was transferred on August 16th to the bank, and the corporation was not formed until August 22, 1916, and that witness, who was secretary and treasurer of the Kaiser Company, had never seen the agreement and did not know anything about it.

One of the McGhees—the McGhees being the contractors, brought me a telegram in December. I went to Mr. Weatherford and I had McGhee get the other member of his firm and bring the telegram to me and we talked it over. I then went to the First National Bank and saw Mr. Durban, who is the cashier of the bank,—showed him the telegram about having the goods shipped if the guarantee
29 was made. The telegram was to McGhee & McGhee, and said that the goods for the hospital were packed and ready for shipment,—if I recall the words—and would be shipped immediately upon additional guarantee or security being given.

In order to get the goods at once, after talking with the others

interested, I got Mr. Durban to guarantee the account. So far as the contract between McGhee & McGhee and the copartnership is concerned, I know nothing about it except hearsay.

The goods never did get here. The greater part arrived after waiting some length of time and way beyond the time they should have gotten here. We had men employed waiting around on the job. McGhee & McGhee furnished a good deal of the money to finish it up. They had it completed and they deducted from the amount of the contract. The McGhees went to Augusta and to Columbia to get parts to finish up the job. We had laborers and plumbers employed ready to do the work, but we were waiting on the goods. We kept the men waiting because the hospital had to be finished in a certain period, and the parts were not there, and we had to send all around and get them, and we had to keep men to have them there when the goods arrived.

Mr. Kaiser was employed by us at the time, and so was Mr. Weatherford,—and received their weekly pay, and we had expenses of telegrams and other charges, and the money paid out for the different parts that we were to have gotten from the plaintiff. It had the effect of breaking up the corporation. It was a big contract for a corporation of the size of ours. The guarantee was sent off the same day I saw Mr. Durban.

We lost something like $3,000 or $4,000 in pay rolls and all, and some of the stuff ordered was never received. I was not present when the stuff was ordered, but I can explain why that contract was in the bank. When we took over the business we found that the bank held that contract as security on three different jobs, viz.: The Attaway job, the C. Oliver Iselin job and the Davis Hankinson residence, and they had nothing to do with the Mott Iron Works,—and that is why it was in the bank.

The First National Bank got nothing from the guarantee. I went in and had a talk with Mr. Durban and explained why I wanted to wire a guarantee for the goods and explained that it was important that we should have them, and showed him this telegram, and told him that if he wanted to help a fellow out to send the guarantee so the goods could come immediately. He said all right, and we stood there while he wrote the telegram. He sent it on and it did not take five minutes.

Mr. Gaston was not consulted by Mr. Durban the day the telegram was sent, and it was sent off in five minutes after I talked with him about getting him to send it.

Cross-examination:

I knew that the contract of Kaiser Company with McGhee was in the bank after Kaiser Company was formed. Kaiser Company, the corporation, did the work at the hospital. It had no other contract. Kaiser Company received the plumbing goods from the depot and took them and used them at the hospital in the work it did. I have no list of alleged shortages or figures on which to base my claim of damages. I have endorsed the debt of Kaiser Company to the bank and consider my endorsement worth something.

Redirect examination:

I am not a considerable real estate owner, but I own some lots on Aiken Heights.

W. H. WEATHERFORD, sworn, says:

H. B. Kaiser and myself comprise the copartnership, and along about August 22d we formed a corporation—The
31 Kaiser Company. The stock in that corporation was owned by Messrs. Oliveros, Kaiser and myself, and later we bought the stock of Mr. Kaiser. The contract with McGhee & McGhee was made during the life of the copartnership.

I see the man here in Court who came down and sold this order to us,—a Mr. Horn. Mr. Kaiser and I had previous to that time had a contract with Haines, Jones & Callaway, of Savannah, and Mr. Horn came and said that the goods were those of the J. L. Mott Co., or their equivalent—that is, the specifications called for such, and he said that this Savannah firm could not furnish them because the Mott Company alone made them and they alone could furnish them. He said that he had the goods at the factory, and on this statement we placed the order with Mr. Horn, and they were to be ready for shipment on October 1, 1916. We explained to them that this was a pretty big contract, and that they would have to ship the goods promptly, and he and I understood that we would have to have the goods to complete the job. He had the specifications and he went over them with me,—each part of the order being a necessary part of all. When a fixture is made up it is made in a certain way and make and you must have that mark and that special make-up, in order to complete the job.

He agreed to furnish the goods on October 1, 1916, as per that order, and he did not do that. All of it never did arrive. When we would have a claim against the transportation company we forwarded to the plaintiff the original bill of lading and let them make claim.

At this point counsel for the defendants asked the witness in making the purchase what price did Mr. Horn agree upon, and he stated further that he wanted to ask what his contract was in reference to the goods and where they were to be delivered. This was objected to by counsel for the plaintiff, and the Court ruled that inasmuch as the order says f. o. b. cars Trenton, N. J., "that is enough. If there is
anything outside of that it can go in, but the paper con-
32 tains it all. He must go by the paper."

Mr. Williams: "I want to know what he told him about prices, and how they arrived at prices."

Court: "Go on, then."

Mr. Williams: "Where is the place of business of J. L. Mott Iron Works located?

A. The home office is in New York.

Q. Have they a place in Atlanta, Ga., also?

A. Yes, sir."

Mr. Henderson: "That is not at all pertinent in this case, and the prices of the goods are in the order. It is not proper here."

Mr. Williams: "I want to show how they arrive at the price."

Court: "I don't know what you are after."

Mr. Williams: "I want the witness to explain what this f. o. b. car Trenton means."

Court: "It means free on board, Mr. Williams."

Mr. Williams: "Yes, sir, but on the point as to where the title of the goods were."

Mr. Henderson: "That is an important question and it is settled by the contract and by the law as to what those words mean. The words 'f. o. b. cars' are judicially construed in decisions I have here. It means that they got the title there. He cannot vary it now that it is in writing."

Court: "The rule is this—take that case from Chester. It is the latest thing on the point. The Supreme Court held that when the whole contract is reduced to writing, it is settled unless there is some ambiguity."

Mr. Williams: "I have already introduced letters to show that they made claim. I will ask the question then, and will tell him not to answer it until the Court has ruled on it."

The Court: "It says (referring to the letter) f. o. b. cars Trenton, N. J., and that is what it means. It means that they would put the goods on board cars at Trenton, N. J., to be shipped here. That is it."

Mr. Williams: "Yes, sir, but I take the position that that is not conclusive as to the place of the delivery. That is my position."

The Court: "You can't go into that."

The statement dated May 1, 1917, was received by us in due course from the plaintiff; also letter of January 11, 1917, and the J. L. Mott filed their claim referred to in the letter; we did not file it. That was to be used in the hospital job.

The paper dated February 6, 1917, was referred to and admitted as Exhibit No. 7, and the letter dated January 30, 1917, we received in due course, and that was a part of the hospital job. That refers to something broken in transit. At the time the order was taken it was not mentioned about a guarantee. The question of payment was not taken up. We had an account with them. Corporation was organized August 22, 1916. Failure to deliver the goods and to ship promptly delayed the hospital job and we had to pay a force of men to carry on the work; they hung around and had a good time and were on our pay roll. McGhee went to Augusta and bought some fixtures to finish the job. He took the price of the fixtures off the contract price. The Henry Hutt Co. furnished some of the material. I see two sinks and a lavatory were short also. We went as long as we could before going on with this work and they didn't come. It broke up the corporation and our lost time and expenses, I would say, was a couple of thousand dollars. I know nothing about the guarantee. I did not attend to that.

Cross-examination:

We were delayed about a month in finishing the job,—finished it sometime the latter part of March, 1917. We had four
34 mechanics and four helpers idle during the month of February, 1917, doing practically nothing, waiting for the Mott goods to come.

The witness was then asked: "Don't you know that this county had one of the worst freezes that has ever taken place on the 3d of February, 1917; that the thermometer went down and that it smashed every pipe in Aiken, and you plumbers were rushed completely to death, and that no plumber could lay idle for a minute?"

The witness admitted that a freeze did occur on that day; that on the next day the thermometer went below to 11 degrees above zero and on the third day lower than nine degrees; that on the 4th day it went up and on the 5th day it went down again, and that practically every water pipe in Aiken burst, and that for a time all plumbers in Aiken were working day and night. Upon being shown counsel's personal bill for plumbing for repairs at his house made by the Kaiser Company, in which there were items of repairs on February 2d, 17th and 24th, witness testified that it was a fact that he was able on February 2d to do nothing but cut off the water in counsel's house and cap the pipe; that he was so busy at other places he could not get back to counsel's house until February 17th, and was then not able to complete the job, and could not get back again to complete the job until February 24, 1917. That this delay in doing the work at counsel's house could not be avoided, although counsel and his wife were continually telephoning and visiting witness and the other plumbers of the Kaiser Company, endeavoring to get some relief from the frozen up condition of his water pipes.

Witness stated that the freeze lasted about two weeks.

Referring to the articles said to be purchased by McGhee, witness was shown the statement which he had referred to in chief and checked over the number of plumbing articles which he contended
35 should be charged against the Mott Company, and found that the same amounted to $58.80, which included a sink and lavatory at $27.50, and which was to take the place of a sink and lavatory which had been shipped by the Mott Company, and broken in transit by the railroad.

As to the question of the assignment of the McGhee contract to the bank, the following questions and answers appear:

Q. "About this contract that was assigned to the bank and introduced in evidence in this case,—that is the only one you had with McGhee?

A. Yes, sir.

Q. And your corporation did the work at the hospital?

A. Yes, sir, we finished the work at the hospital.

Q. Your company got the pay?

A. Yes, sir.

Q. Did you hold any office in the corporation of the Kaiser Company?

A. Yes, I was president."

Witness remembers that there were some nickel plated faucets and some drain boards that came in late; neither of them, however, tied up this job or caused any serious inconvenience as the faucets could simply be screwed in after the fixtures had been placed, and the drain boards could simply be slipped into place without any difficulty. The failure of these fixtures to come on time could have tied up a job, but it did not delay this one.

A. B. McGHEE: This witness is a contractor and builder and is in business with his brother as McGhee & McGhee, and had the hospital contract, and the Kaiser Company had the building. Witness was around about the job often—practically every day. I superintended the job. I saw the Kaiser Company's men hanging around waiting for the goods to come. I was subpœnaed here by plaintiff's attorneys. Alone from any profit in that job my opinion is that approximately between $1,000 and $1,500 loss and damage was sustained by the holding up of the many little things that was needed
35 on the job while it was going on. We finally came to the rescue of the Kaiser Company, and completed the job.

Cross-examination:

I had quite a little difficulty in obtaining the parts that were short on this job. I made possibly four or five trips to Augusta and finally succeeded in getting some of the parts from Mr. Erbelding and some from others, and finally got Mr. Brittingham to order some of the slip-joints and ells from Atlanta. There were some nuts and spuds that were short and some slip-joints and ells that seemed to give more trouble and caused lots of delay. I referred this shortage to the architect. I didn't take up the matter of buying anything until I first referred the matter to Hoppin & Koen, the architects on the hospital job. I suppose it was anywhere between two and three weeks possibly on some of these things that it held up the job before I proceeded to get them elsewhere, and it was difficult for me to get them.

Redirect examination:

Q. "In other words, why did you want to get them?

A. Because the architects were after me with a stick to complete the job as it was behind time then, and I was trying to get these things to finish up."

Q. "You could not complete the job until these things which were short and delayed were in?

A. I had to get some of them from Augusta.

Q. How much did you deduct from the Kaiser Company's account, according to that, in order to complete the job?

A. $1,100 and some odd cents. We spent that much completing the job. Some of the items we deducted for have nothing to do with the contract price with the Kaiser Company, as they were items which the Mott Company had nothing to do with."

37 H. B. KAISER, a witness, says:

I have been a plumber ten or twelve years. Mr. Weatherford and myself went in business once as a copartnership, and about August 22, 1916, a corporation known as the Kaiser Company, was organized, and before the corporation was formed we calculated on doing the plumbing work of the Aiken Hospital. The Mott Company sold us the stuff to do the work with. We had already agreed to buy the stuff from Savannah. Mr. Horn said the Savannah concern could not furnish it and that his company could; said they had it and could furnish it, and we gave him the order, and it was to be ready for shipment at any time. Parts of the stuff came while I was working for them at the hospital. I was not a member of the corporation then. The company estimated that it would earn about $2,000 to $2,500, and it was a big contract for the company. When the salesman of the company was here it was understood that it was a hurry-up job. I don't think there was any specified time. It was a rush job, and we informed him that it was a big contract for the company.

I left the Kaiser Company's employment the last of February or the 1st of March; had been waiting for stuff to come from the plaintiff. I made tool boxes up there and that was all. As fast as the stuff came in we put it in the building. We had another man there. We had a freeze up which lasted about a week or seven or eight days in which we worked elsewhere. The failure to furnish this stuff had the effect of having our men go up there and work two or three hours and put on a faucet today and fix some little thing tomorrow; there is no earning on a job like that because you are paying a man $4 or $5 to do seventy-five cents' worth of work. It is a losing proposition. They went on that way about a month. I got tired sitting around and left Aiken. I was disgusted with the hospital job. I
38 was not here when the job was completed. I would say the loss would be about $2,000 to $2,250. I have no interest in the company. I left Aiken about the 1st of February, 1917, and the last batch of the goods from the plaintiff had not come, and McGhee had not yet taken up the work of completing the job.

D. W. GASTON says:

I am president of the First National Bank and Geo. A. Durban is cashier. I never heard of the guarantee of the Mott bill until after it was done. Mr. Durban does not usually act on important matters until he sees me, but he did not see me in this case. We have no rule or regulation authorizing any man there to guarantee a bill. The president and cashier cannot act without a resolution of the board of directors. There has been one or two occasions when

we would have to have money and would go and get it and then say tomorrow, get the board together and have a resolution passed. That is what we sometimes do. The board of directors did not authorize this guarantee, and I did not. I never heard of it until afterwards. The bank has received no benefit that I know of from the guarantee. McGhee has never put a cent of money in that bank. The Kaiser Company deposited in our bank and they borrowed money on some jobs, too.

*Testimony of the Plaintiff in Reply.*

J. B. HORN says:

I live in Atlanta, Ga., and am the representative in this territory of the plaintiff. I came to Aiken to take the order in question and got it and they signed it. There was no conversation regarding delivery. No date was set. When I was in Aiken the building was begun, and the Kaiser Company did not know when they would need the stuff, and no shipping date was discussed.

9 Hospital goods are special and they are made up. We would have to make up the order and we would not have accepted an order in July to ship in October. I did tell him that the Savannah concern did not have the pattern and I did not think they could furnish the goods. The specifications stated they must be Mott goods or their equivalent. We had the pattern ready, but not the goods. I simply turned in the order and the question of payment was not discussed. That is a matter left with the house. I simply sell the goods. I am positive the stuff was not to be shipped until the company was notified.

Cross-examination:

Q. "How long, then, before you begin to make up an order for shipment? When you take the order do you begin to make it up?

A. Yes, sir, unless it is an order to be shipped in two years' time, or something like that. We take orders for some buildings that it takes five years to build, and, of course, we could not start right off.

Q. When your company is notified to ship it then they ship it?

A. Yes, sir. The home office of the company is in Trenton, where the works are located, but the company also has an office in New York. The financial part is handled in New York, and at the time this order was taken the home office was in New York. If they had started making the fixtures, the order being dated June 21, 1916, they could have had them ready before December.

Q. In other words, you commence making them up before financial arrangements are made?

A. Yes, sir."

Redirect examination:

I have been a salesman for fifteen years. It is not the custom for salesmen to take orders and at the same time talk with customers

about finances. The company to whom the order is sent always handles the question of credits and finances.

10 H. C. WILLIAMS says:

At the present time I am acting agent of the Southern Railway at the freight depot. The agent is Mr. Smith. At present he is in Texas on a vacation. As acting agent at the freight depot, I have the deliveries of freight, and I have gone into the question of deliveries to the Kaiser Company from the plaintiff of several shipments which were allowed to stay in the depot so long that storage was charged on them. At this point counsel for the defense objects on the ground that the witness made no record, and he does not show that he knows anything about them.

The Court: If he made no record, he can testify as a matter of fact that the shipments were there. Of course, the records are the best evidence.

Mr. Williams: He didn't make the records, though.

Mr. Henderson (continuing):

Q. You have been working in the freight depot for quite a while?
A. For two years, yes, sir.
Q. When a shipment is received——

Mr. Williams: I object to a shipment. It is this shipment we are talking about.

Mr. Henderson: This man is the assistant at the depot and in charge there while the agent is away—and I expect to prove by him that the custom and practice at that depot and all depots is that when a shipment arrives, a freight receipt is made bearing that date, and also a postal card is sent out to the consignee notifying him of the arrival of the stuff. When that is done he has to produce certain notations of Mr. Smith, who is away, and whose handwriting he knows, and I also expect to show the collection of storage charges on these goods in the handwriting of Mr. Smith, which this witness knows.

Mr. Williams: Since Mr. Henderson has testified there is no need to go any further.

11 Mr. Henderson: You are objecting to the relevancy of the testimony, and I am just telling you what I can prove.

The Court: It is like proving an account. The best evidence that you can get is the evidence that we must have. If you cannot get the best, then the best there is, is the rule.

Mr. Williams: Yes, sir, but what would be the best evidence?

The Court: The man who made that entry,—but here you cannot get that,—then the next best is all right. Go ahead Mr. Henderson.

Mr. Williams: I want my objection in the record.

The Court: The Stenographer has it, I suppose.

Mr. Henderson (continuing):

Q. When a shipment arrives at this freight depot what is done as to writing out a receipt?
A. When a shipment arrives we make what is called a freight bill and that covers the shipment.
Q. That is your custom?
A. Yes, sir.
Q. Is that paper that I show you one of the freight bills that you refer to (handing the witness a paper)?
A. Yes, sir.
Q. You make out a freight bill similar to that covering the shipment when it arrives?
A. Yes, sir.
Q. When is that freight bill made out and dated?
A. It is the same time that the shipment arrives.
Q. What is done as to sending a postal card or any kind of notification to the consignee?
A. A postal notice is mailed the same day to the consignee.
Q. This document that I show you,—did you find that in your records at the freight depot?
A. Yes, sir.

Mr. Williams: Of course, our objection is continuous here.
The Court: Yes, sir.

Mr. Henderson (continuing):

Q. You see that is made out in typewriting?
A. Yes, sir.
42 Q. Any pencil notations on there also?
A. Yes, sir.
Q. Do you find a signature?
A. Yes, sir, right there (witness indicates).
Q. Whose signature is that?
A. Kaiser Company's.
Q. The other penciled notations on there are in whose handwriting?
A. In Mr. Smith's handwriting.
Q. You know that handwriting?
A. Yes, sir.

Mr. Henderson: We offer in evidence freight receipt dated 12-27-16, showing shipment to Kaiser Plumbing Company from the J. L. Mott Iron Works,—the date of the receipt being 12-27-16. The amount of freight is $66.37, and storage of $3.95 at 79 cents per day. The particular point that I call to the attention of the jury is storage for five days at 79 cents per day,—or a total of $3.95 for storage.

(Mr. Henderson shows the freight receipt as above to the jury, and explains the same to them, also the item of storage on receipt.)

Mr. Henderson (continuing):

Q. I call to your attention, Mr. Williams, the record of the cash book of this office,—the Aiken office,—do you find a notation showing when the freight and storage was paid, and when the goods were taken out of the office by the consignee?

A. They were taken out on the same day that this entry was made in the cash book.

Q. You have seen the entry in the cash book?

A. Yes, sir; I have it here.

Q. What day is that?

A. January 9, 1917.

Q. That they were taken out of the depot?

A. Yes, sir.

Q. And this bill shows that the shipment was received on the 27th of December?

A. Yes, sir.

Q. What does that cash book show about storage?

A. There is a place provided where storage entries are to be made.

43 Q. Does it show the collection of storage in this instance?

A. Yes, sir.

Q. How much storage did they pay?

A. $3.95.

Q. Just like on this freight bill?

A. Yes, sir; that is what it calls for.

Q. And your cash books show the collection of it?

A. Yes, sir.

Q. How many days are allowed before you have to pay storage on freight?

A. At the present time it is three days.

Q. At that time it was five days?

A. Yes, sir; I guess so.

Q. I next call to your attention, Mr. Williams, a bill dated January 6, 1917?

A. Yes, sir.

Q. Is that a record of your office?

A. Yes, sir.

Q. Is that in Mr. Smith's handwriting?

A. Yes, sir.

Q. The book notations are in Mr. Smith's handwriting?

A. Yes, sir.

Q. That shows that it is received by the Kaiser Company, does it not?

A. Yes, sir.

Q. And has a list of items?

A. Yes, sir.

Q. When was that shipment taken out of the depot?

A. January 9, 1917.

Q. There is no storage on that?

A. No, sir.

Q. But it laid in the depot three days?
A. Yes, sir.
Q. It was taken out on January 9th?
A. January 9th, yes, sir.

Mr. Henderson: We offer both of these records in evidence.
Mr. Williams: The same objection applies.

Mr. Henderson (continuing):

Q. I next show you a receipted bill dated January 30, 1917?
A. I see.
Q. Is that a record of your office?
A. It is.
Q. Is this in Mr. Smith's handwriting also?
A. Yes, sir.
Q. How many days' storage did they pay on that?
A. Eighteen days.
Q. This shipment is one box of V. P. fittings?
A. Yes, sir.
Q. It arrived when?
A. January 30, 1916.
Q. You mean 1917?
A. Yes, sir.
Q. When was this delivered?
A. February 23, 1917.

This was offered in evidence and the same objection made.

Q. A delivery of the last shipment there was made on February 23d, 1917?
A. Yes, sir.
Q. I next show you a receipt dated February 16th, 1917?
A. Yes, sir.
Q. These storage notations on that shipment are in Mr. Smith's handwriting?
A. Yes, sir.
Q. When was that shipment delivered?
A. The record shows February 23d, 1917.
Q. That shows three days' storage at two cents per day—a storage fee of six cents?
A. Yes, sir.

This was offered in evidence, also the entries of the book referred to, being four receipts and the cash book, "Exhibit No. 8." To this the same objection was made by counsel for the defense. All of these objections were made upon the grounds set out hereinabove.

WM. E. MCGOWAN, sworn, says:

I live in New York city. I am distantly related to the South Carolina family of McGowans. This is my first visit to South Carolina. I am salesman and engineer in the hospital department

of plaintiff. Mr. Horn took the order from Kaiser Co., and sent it in and I was detailed to take charge of the proposition of filling the order and handling the correspondence in connection with it. Part of the correspondence was conducted by me and part by the secretary of the company.

(NOTE.—It had been agreed previously by counsel that the presence of Mr. Max Goeckel, the secretary of the company, might be dispensed with at the trial and that Mr. McGowan might produce letters written and received by him.)

Witness continuing: I have a complete file of the correspondence between the plaintiff and Kaiser Company, and the First National Bank.

Plaintiff's counsel then announced to the Court that he desired the witness to produce and read to the jury the complete correspondence, making such comments as might be necessary upon the various letters as the reading progressed. This correspondence is printed amongst the exhibits under the heading of "General File of Correspondence" with alphabetical notations assigned to each item thereof.

The Court is referred to said file and the testimony of the witness as to such items of correspondence as it is necessary to insert, are now inserted as follows:

After the reading of "Exhibit D" the witness testified that in said letter defendant was asked to check over each item and to reply if any change was needed; that this was of extreme importance in case there were any local conditions at the building that the plaintiff company did not know about. That something had been said in the testimony about slip-joints and ells and things of that kind. That there were absolutely none of these in the order to the Mott Company; that the prime object in sending this detailed list was to find out if the defendant needed any of these articles and if defendant had replied stating that any of them were needed they could have easily been furnished, but absolutely no reply was ever received to this letter.

After the reading of "Exhibit M" the witness testified that up until this time the plaintiff had been able to get the defendant to make no financial arrangements whatsoever to secure the payment of the purchase price of the plumbing fixtures; that it cer-
46 tainly would not have been a proper business arrangement to furnish the same on open account, the bill being for $2,365.50, to a company that was incorporated but for $1,000.00; that the plaintiff company knew nothing of the fact that the contract of Kaiser with McGhee had been assigned to the bank, and were endeavoring to get an assignment to the extent of the contract price of the plumbing work; that that was the plaintiff's endeavor up until the time that the telegram, "Exhibit P," was received, the same constituting the guarantee of the First National Bank.

The witness called attention of the Court (which fact is admitted) to the fact that the letters written by Kaiser Company prior to

October were on a printed letterhead entitled "H. B. Kaiser Co.," and giving as the names of the copartners H. B. Kaiser and W. H. Weatherford, when after the incorporation the letterheads used were that of "Kaiser Company" as a corporation.

After reading "Exhibit P," this telegram was sent on a Saturday—half holidays observed in New York—and it did not reach the offices of the plaintiff company until December 4th, the same being Monday. As soon as this telegram was received the company, on the faith of the guarantee of the First National Bank of Aiken, ordered the shipment of the goods and the shipments moved, having been previously packed, as is set out in the admitted testimony of the packers and shippers of the plaintiff corporation, put in evidence in chief.

Referring to the testimony of a witness that McGhee received a telegram about the 1st of December, in which it was stated that the goods were packed and ready for shipment, the witness testified that the telegram set out as "Exhibit O" was the only telegram sent upon that subject or any kindred subject.

47 After the reading of "Exhibit X" the witness testified that he had the shipment traced by wire as promised in that letter; that it was a fact that at that particular time there was a bad freight tie-up and a congestion, and frequent embargoes on freight; that a shipment of freight which left Trenton, N. J., on the 6th of December and arrived on the 27th of December at Aiken, and one that left Trenton, N. J., on the 11th of December and got to Aiken on the 9th of January, was under the circumstances an extremely prompt shipment.

After reading "Exhibit Y" it is a fact that the plaintiff company made an investigation of the financial standing of the Kaiser Co., and that the same did not justify their being credited to the extent of this order without some security being given.

After the reading of "Exhibit Z" the witness took up in detail each of the items referred to in said "Exhibit Z," and using the packing sheets which were offered in evidence in chief, and which it has not been necessary to print, showed to the Court that upon the packing sheets which the packers and checkers had sworn were the articles actually packed and shipped, that each one of the articles referred to in "Exhibit Z" had actually been packed and shipped by the Mott Co.

That the Veritas Lavatory and Beekman sink referred to as having been broken in transit was replaced by the shipment of a new sink and a new lavatory on the 2d of February, 1917; that when "Exhibit Z" was received witness acknowledged it on a postal card, acknowledging its receipt, and then took sufficient time to secure from the factory in Trenton the original packing tickets in order to find out definitely that all of the articles in question had actually been shipped; that each of the articles missing except the lavatory and sink were very small articles and it would very

48 easily happen, and in fact in the knowledge of the witness, very frequently did happen, that in opening up a tre-

mendous quantity of goods such as the defendants got, upon receipt of the two big shipments, that these small articles could, and in all human probability were, lost in the straw and packing and thrown aside.

That at about the time that "Exhibit AA" was received, witness had completed his investigation and he then sent telegram, "Exhibit BB," and letter, "Exhibit CC," on January 30, 1917; in the latter letter witness specifically requested Kaiser Company to make a thorough search for the small missing articles and stated to them that he would be pleased to duplicate promptly these parts if they again reported that they could not be found. Witness, however, heard absolutely nothing more from the proposition until he received on March 14th "Exhibits DD" and "EE."

Further after the reading of "Exhibit CC" witness testified that the claim for the breaking of the Veritas Lavatory and Beckman sink was the only claim that the company put in against the railroad company; that it was done as a matter of accommodation to the customer and that witness did not mean by doing so to change the status at all.

On March 13th telegram, "Exhibit EE," was received, which gives some new items of alleged shortage, viz.: slipjoints and elbows. Neither of these were in the original order. The witness has gone carefully over the original order and the revised statement of the architects and states positively that no such items appear therein; that the plaintiff's establishment does not furnish slip-joints or elbows; that such articles as these were not in the order or in the revision of the architect; that in said telegram McGhee refers to nuts on three clinic slop-sinks which were one thread too small, but that by referring to the architect's list and to the packing sheets it appears that the plaintiff shipped the exact size that was
49 ordered. After reading the telegram in question witness ordered the factory to make up as a special order the slip-joints and elbows desired, sending a telegram to the factory to do so, but before they were prepared witness got a telephone message from the architects to do nothing further, as they had gotten the things elsewhere.

Plaintiff's counsel objected to this testimony on the ground of hearsay and the Court ruled the same to be competent.

Witness, continuing, testified (over objection) that a few days after March 13th he received a message from Mr. McCullough of the architects' office saying that McGhee & McGhee had secured the parts elsewhere and for the witness not to bother to send them. That after this telephone call the witness proceeded no further, but if he had not received it he would have had all the articles referred to in the telegram of March 13th shipped, he having ordered the factory immediately upon receipt of said telegram to have all the articles requested therein prepared for shipment.

Cross-examination:

From the information I had from the architects, I assumed they would want the fixtures about October 1st, 1916, and we had notified

the works tentatively to prepare for that date. We had been extending credit to the same company. They owed us $648.00 then. I do not know whether it is paid or not. I don't know of any effort we made prior to October 1st to have the account guaranteed.

Q. In your letter of January 30th, didn't you assign the delay to your not being able to get them to tell you when they wanted the stuff?

A. Yes, sir. We at the time had an account with Kaiser Company, though we did not take up question of securing account until after October 1st. Our reason for not shipping all the stuff in three days was some of stuff had not been made up, that is
50 faucets and drain boards. When we said we could ship in three days, we based our statement on a report from the factory, but it proved they did not have the faucets and drain boards then. We follow the plumbers and what they say. We followed the architects until in September, until we had the final changes. I have not the order for the heater and it was not in it. The Atlanta office is a branch office. The letter dated July 8th, 1916, was written by J. B. Horne and is from the Atlanta office. That heater is for the hot water supply of the building, the hospital. We asked the bank to guarantee the amount we stated and they did so. We have not delivered the heater mentioned, but presume we delivered the other one on the quotation.

Counsel for defense offered in evidence letter of July 8th, 1916, from the Atlanta office to the defendants, "Exhibit 9."

Plaintiff's counsel objected, because not written by this witness and about a different matter. Witness said he knew signature and it was that of J. B. Horne of their Atlanta office. Then the letter was again offered and counsel for plaintiff objected further, on the ground that the heater was not in the order and had not been sued for.

Counsel for defense submits that it was proper as part of hospital equipment and plaintiff had breached its contract.

The Court said: There might have been thousands and thousands of things going into the building and there probably was, but we cannot go into anything except what is being sued for in this case. If we should open up this case and go into everything else, then we would never get through.

Mr. Henderson: Yes, sir, but it is not in the order, and that is the point here. The specifications are for a heating and plumbing proposition. The contract governs, I submit. In the contract they order only plumbing fixtures—and that is what we are suing
51 for here—and a heating proposition has nothing in the world to do with this case. What is being sued on here is an order for a portion of the things that McGhee & McGhee contracted with Kaiser Company to put in.

The Court: I am not going to let it in, because I don't think it has any bearing here.

Mr. Williams (continuing):

Q. Well, that original order was taken and sent to your concern by Mr. Horne?
A. Yes, sir.
Q. The original order—the plumbing fixtures?
A. Yes, sir.
Q. And the architects made changes?
A. Yes, sir.
Q. And then you gentlemen had to follow the specifications, of course?
A. No, sir, we never took the order as per specifications.
Q. You do follow them?
A. No, sir, we follow instructions from the plumbers—and if the architect gives instructions we notify the plumbing company of the instructions.
Q. You don't follow them?
A. No, sir, not unless the plumbers notify us to.
Q. And to that extent you altered the contract?
A. With their consent.
Q. Was it not altered in reference to a heater?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.

Mr. Henderson: The alterations made are in writing, and are in front of us.

Mr. Williams (continuing):

Q. Well, what is this letter about?

Mr. Henderson: I object to that.
Mr. Williams: Read the letter then, Mr. McGowan.

(Witness reads letter from Atlanta office to Kaiser Company, dated October 11th, 1916.)

52 Mr. Williams (continuing):

Q. Who makes the specifications?
A. The architects.

Mr. Williams: Is that admissible?
Mr. Henderson: No, sir, I submit that it is not. The only changes made by the architect are already in evidence.
The Court: Wait a minute. Mr. Witness, has that anything to do with this case?
Witness: No, sir, it has nothing to do with the plumbing fixtures, and it is not included in the Kaiser Company's order—which is the subject matter of this suit.
The Court: Is that included in what you are suing for here?
Witness: No sir, it has nothing to do with the original order, and

the correspondence shows that we asked the bank if they wanted to increase their guarantee, and they refused to do it.

The Court: What is the purpose, Mr. Williams?

Mr. Williams: It says specifications in there, and Mr. Horne admits there that he prefers to follow the specifications.

The Court: The question is what order was given to this concern that they are suing on. I don't see where it comes in this case.

Mr. Williams: It says please enter our order for the plumbing fixtures of the hospital—Messrs. Hoppin & Koen, architects—and I understand, if the Court please, that the architects make the specifications.

The Court: They are not suing for this.

Mr. Williams: I am claiming that they didn't deliver it.

The Court: Yes, sir, but if they did not it makes no difference, because they are not suing for it, and it does not enter this case.

Mr. Williams: I am showing in my counterclaim that they delayed it.

53 Mr. Henderson: It says in the counterclaim that we delayed them by not sending the things we are suing for, and he cannot go into anything else whatever. It isn't in the case.

Mr. Williams: I take the position that it is an admission of theirs that they had rather follow a certain specification, and that Hoppin & Koen were the architects, and they must have known what they were doing.

The Court: I don't see where it comes in in this case, and I rule it out.

Mr. Williams: I would like to have the stenographer identify these letters then.

(Stenographer identifies the letters of October 11th, 1916, and July 8th, 1916.)

Mr. Williams: So I need not pursue any correspondence that I have on the point that the architects made changes.

The Court: No, sir, not on anything except the contract.

Mr. Williams: Well, sir, he can take the witness then.

Redirect examination.

The first letter from me taking up the financial arrangement was dated October 21st, 1916, and asked for an order on the contractors.

At the conclusion of the testimony a motion was made to direct a verdict as to the bank, on the same ground as the motion for nonsuit was made on, to wit, that a National bank could not guarantee payment of mercantile bills, such as the one in question, and under the circumstances surrounding this case, and the cashier had no authority to bind it for such a bill as guarantor.

The motion was overruled.

54 EXHIBIT No. 1.

Aiken, S. C., June 21, 1916.

The J. L. Mott Iron Works, Atlanta, Ga.

GENTLEMEN:

Please enter our order for the plumbing fixtures for Aiken Hospital, Messrs. Hoppin & Koen, Architects, as follows:

4 Water closets, 477-H.
11 Water closets, 476-H.
2 Baths 5' 6" enameled iron.
7 Baths 2759-A.
4 Lavatories 27" x 24" 95-H.
1 Lavatory, 27" x 24" 64-H.
9 Lavatories 20" x 19" 1329-A.
1 Shower with 42" x 42" receptor and strainer.
1 Slop sink 22" x 24" 7506-A.
3 Galvanized iron sinks 30" x 20".
1 Pantry sink 7068-A.
2 Examination room sinks 64-H.
2 Utensil room sinks 36-H.
1 Nurses' room sink 4329-A.
2 Kitchen sinks w. drain boards 7054-H.
1 Operating room sink 134-H.
1 Service room sink 38-H.
1 Set of five wash trays 7602-A.
1 Floor drain 3083-A w. set of valves 3085-A.

All of the above fixtures for the total net sum of twenty-three hundred and thirty-five ($2,335) dollars, f. o. b. cars Trenton, N. J.

Yours very truly,

H. B. KAISER CO.

H. B. K.

55 EXHIBIT No. 2.

September 13, 1916.

The J. L. Mott Iron Works, New York City.

DEAR SIRS:

Re Aiken Hospital.

We are returning to you herewith one set of revised description of fixtures, dated August 8, 1916, for the hospital at Aiken, S. C.

These fixtures, according to the revised list, have our approval, except that we have decided to use but four tubs in the laundry, in place of five as per your list.

Will you, on receipt of this letter, make out a duplicate set of illustrations and descriptions of these fixtures, forwarding one copy to us and one copy to Messrs. McGhee & McGhee?

Yours very truly,

HOPPIN & KOEN.
McC.

McC.—W.

Enc.

Attached to Exhibit No. 2 are six typewritten sheets on the letterhead of the J. L. Mott Iron Works, headed as follows:

New York, July 18, 1916.

Revised August 8, 1916.

H. B. Kaiser Co., Aiken, S. C.

When to Ship—Get ready for September 1, 1916, definite date later.

Then follows a detailed statement covering said six pages of articles to be furnished, which checks exactly with Schedule "A," attached to the complaint and printed herein, except that at the end of the fourth page of said list, and after the expression "Plate 64-H," the following articles are set out:

3 Vitreous Clinic slop sinks.
3 N. P. cleansing jets.
3 Vitreous trap standards, with bolts and porcelain bolt caps.
3 N. P. combined standard and jet supply.
36 3 Sets combination supply valves, with china name plated and removable bonnets for jet control and supply to nozzle: nozzle to be fitted with pail hook and brace to wall.
3 N. P. Mansfield push button tank pulls.
3 No. 39 plain ash cisterns.
3 pairs japanned steel brackets.
3 Rough brass 1½" flush pipes, with coupling nuts and lower bends to connect with N. P. flush connection through partition.
3 Rough brass floor flanges, with bolts and porcelain bolt caps.
Plate 38-H as described.

In the margin opposite the articles just set out, in pencil, appears the following memorandum:

"Changed by Mr. Foley September 16, 1916, at store.
W. E. M."

EXHIBIT No. 3.

Exhibit No. 3 is a telegram reading as follows:

Aiken, S. C., 12.12 p. m.,

December 2, 1916.

J. L. Mott Iron Works, New York:

We guarantee payment amount twenty-three hundred sixty-three dollars fifty cents account Kaiser Company shipment under contract for hospital at Aiken.

FIRST NATIONAL BANK OF AIKEN.

Upon this telegram is stamped the receiving stamp of the plaintiff company showing receipt of the telegram by the plaintiff company in New York on December 4, 1916.

57 EXHIBIT No. 4.

McGhee & McGhee

against

H. B. Kaiser Co.

*Memorandum of Agreement.*

This agreement entered into this 16th day of August, 1916, between McGhee & McGhee, a copartnership doing business in the city of Aiken, State of South Carolina, parties of the first part, and H. B. Kaiser and W. H. Weatherford, a copartnership doing business in Aiken, State of South Carolina, under firm name of H. B. Kaiser Co., parties of the second part. Witnesseth:

1. H. B. Kaiser Co. is to install heating and plumbing system for Aiken Hospital according to plans of Hoppin & Koen, architects, of New York, for the net sum of seven thousand eight hundred dollars ($7,800).

2. McGhee & McGhee are to pay H. B. Kaiser Co. 85% of the amount of labor and materials furnished each month, the remaining 15% to be paid by the party of the first part to party of the second part on completion of heating and plumbing system.

3. H. B. Kaiser Co. is to install a five-inch sewer line from five feet out of cellar walls to the city connection in the streets, five-inch terra cotta, 40 cents per foot, five-inch cast iron, 65 cents per foot.

This last item is in addition to the above bid, and H. B. Kaiser Co. is to receive extra pay for same.

McGHEE & McGHEE. [L. S.]
Per A. B. McGHEE. [L. S.]
H. B. KAISER CO. [L. S.]
H. B. KAISER. [L. S.]

In the presence of:
J. H. EPPS.
D. S. LORD.

58 On the back of this agreement is the following, indorsed:

We hereby transfer the within contract to First National Bank of Aiken, S. C.

H. B. KAISER CO.,
By H. B. KAISER,
*Vice President.*

Witness:
G. A. DURBAN.

We hereby agree to the above transfer and agree to make all checks payable to above-named bank on this contract.

McGHEE & McGHEE.
Per A. B. McGHEE.

Witness:
J. H. EPPS.

EXHIBIT No. 5.

Exhibit No. 5 is written on the letterhead of the First National Bank of Aiken and reads as follows:

Aiken, S. C., March 19, 1917.

The following listed checks signed by McGhee & McGhee have been placed to the credit of the firm of Kaiser Co., plumbing contractors, and were paid to Kaiser Co. on the Aiken Hospital contract:

November 5, 1916, $2,000.
November 25, 1916, $468.
February 3, 1917, $3,000.

GEORGE A. DURBAN,
*Cashier.*

EXHIBIT No. 6.

Exhibit No. 6 is a check dated July 4, 1917, drawn by McGhee & McGhee on the Bank of Western Carolina in favor of First National Bank for $1,105.28. Written on the face of the check are the following words: "For Kaiser Co. for Hospital contract."

Upon the face of the check is a rubber stamp impression bearing the words "Note Teller." On the back of the check is the indorsement of the First National Bank for collection.

59 EXHIBIT No. 7.

Aiken, S. C., May 7, 1917.

Kaiser Plumbing Co.

Hospital Bills Paid by McGhee & McGhee.

To McGhee & McGhee, Dr.

| | | |
|---|---|---|
| Marble shower stall | $69.00 | |
| Freight, dravage and charges | 2.55 | |
| Clean-outs, freight and charges | 5.45 | |
| Setting range | 5.00 | |
| Dravage on range | 1.00 | |
| Half gallon paint | 1.25 | |
| One quart dryer | .35 | |
| Henry Hut, for fittings, slip joints and ells | 8.40 | |
| Henry Hut, slip joints, sleeves and coupling | 3.15 | |
| Thomas Brittingham for sill cocks | 7.50 | |
| Jiffy Fire Hose Rack Co., South, Express Co. | 319.29 | |
| Southern Express Co., C. O. D., flanges one leg section | 28.49 | |
| McAuliffe for C. O. D. two sinks | 21.00 | |
| E. J. Erbelding, for lavatory | 17.00 | |
| To bills of telegrams for March | 2.50 | |
| March 31, telegrams Kaiser Co | 1.26 | |
| March 28, telegrams Kaiser Co | 4.18 | |
| March 17, telegrams Kaiser Co | 3.51 | |
| | | $501.18 |
| Allowance for range | | 275.00 |
| Laundry stove and dryer, f. o. b. N. Y. | | 410.00 |
| Total amount of bills paid by McGhee & McGhee. | | $1,186.18 |
| November 3, 1916, paid by check | | 2,000.00 |
| November 25, 1916, paid by check | | 468.00 |
| February 3, 1917 | | 3,000.00 |
| | | $6,654.18 |
| | | 5.00 |
| | | $6,649.18 |
| 60 Contract price | | $7,819.00 |
| Total amount paid | | 6,654.18 |
| Balance due | | $1,164.82 |
| | | 40.46 |
| | | $1,205.28 |

## EXHIBIT No. 8.

Exhibit No. 8 comprises the records from the freight depot introduced by the witness, H. C. Williams. The same covers a freight receipt headed December 27, 1916, showing the arrival of a large shipment of plumbing fixtures on that date; the receipt bears the signature of Kaiser Co. and shows the payment of the freight thereon, together with five days' storage at 79 cents, making a total of $3.95 storage.

The record of cash book of the office shows the payment on January 9, 1917, of the aforesaid $3.95, paid on that day, to wit, January 9, 1917, upon a shipment from the Mott Company to the Kaiser Company, the same having arrived in Aiken on December 27, 1916.

Next is a freight receipt showing the arrival of a large shipment of plumbing fixtures at the Aiken depot on January 6, 1917, and its delivery to the Kaiser Company on January 9, 1917.

Next is a freight receipt headed January 30, 1917, showing arrival on that date from the Mott Iron Works to the Kaiser Company of one box of fittings, the receipt of the Kaiser Company for the same on February 22d, and the payment of eighteen days' storage thereupon.

The record of cash book of said depot likewise shows the receipt of said box of fittings on January 30, 1917, its delivery on February 22, 1917, and the collection of eighteen days' storage thereupon.

Next is a freight receipt headed February 16, 1917, showing the arrival on that date from the J. L. Mott Iron Works, consigned to the Kaiser Company, of one lot of wooden drain boards with fittings attached, with receipt signed by Kaiser Company dated February 22, 1917, showing the delivery to them on that date and the payment by them of three days' storage thereupon. The record of cash book likewise shows the arrival of said articles on February 16, 1917, and the collection of three days' storage thereupon.

## EXHIBIT No. 9.

Atlanta, Ga., July 8, 1916.

Messrs. H. B. Kaiser Co., Aiken, S. C.

GENTLEMEN:

Relative to 500-gallon, extra heavy storage tank and brass-jacketed heater specified for Aiken Hospital, I beg to quote you as follows:

1 Extra heavy black steel tank, size 42 x 84, with manhole, approximate capacity 504 gallons.

1 Heavy brass-jacketed No. 27 Sunray heater, complete with regulator.

All of the above for the total net sum of $329.50, f. o. b. cars factory, Trenton, N. J. Approximate shipping weight, 2,000 pounds.

Our No. 27 brass-jacketed heater would be a pretty strong heat
for a 504-gallon tank.

If our No. 25 brass-jacketed Sunray heater can be used you ma
deduct from the above price $90.

Trusting to hear from you at the earliest possible moment in refe
ence to this quotation, I am,

Yours very truly,

JOHN B. HORNE.

62 EXHIBIT No. 10.

Atlanta, Ga., October 11, 1916.

Messrs. H. B. Kaiser Co., Aiken, S. C.

GENTLEMEN:

Re: Brass-jacketed heater for Aiken Hospital. I have receiv
your letter reading as follows:

"Answering yours of the 28th, will say that we notified New Yo
office, heating department, that we wanted jacket heater for hospi
to comply with specifications. This was done at least thirty da
ago."

You say nothing about the additional charge we will have to ma
of $25.

We prefer to get this matter thoroughly understood before
make up this heater, as it is special. Please advise me if you ca
to pay the extra $25 to have the heater made according to spec
cations, or will you accept the No. 24 heater which we quoted you
and accept the responsibility yourselves as to whether it fills t
specifications. We have told you we believe the No. 24 heater
amply large, but we do not wish to furnish the No. 24 heater when
No. 26 is called for in the specifications and guarantee to fill t
specification.

Please advise me by return mail if you wish us to furnish the lar
size No. 26 heater and pay $25 additional.

We can do nothing with this order until we hear from you.

Yours very truly,

JOHN B. HORNE.

EXHIBIT No. 11.

Upon the heading of the packing sheets referred to in the te
mony in chief the following appears:

"When unpacking be careful to account for all items below en
merated. Don't throw away any articles with the straw. The goo
have been carefully checked, but, nevertheless, should there be a
shortage such must be reported to the J. L. Mott Iron Works imm
diately."

63 EXHIBIT A.

August 9, 1916.

The H. B. Kaiser Co., Opera House Building, Aiken, S. C.

GENTLEMEN:

Re Fixtures for Aiken City Hospital.

We have refrained from sending you roughing in measurements for fixtures called for on your order given our Mr. J. B. Horne for the above building until more details could be secured from the architects, Messrs. Hoppin & Koen, of this city.

Yesterday we had an urgent telephone call from their Mr. J. McCullough, who required certain information that he might proceed with some detailed drawings which he was preparing in connection with the plumbing work. We went over the order with him thoroughly and a number of changes were made to conform to the new arrangement of the fixtures.

We have agreed to send him full description of the fixtures as we now understand that they will be required and he will check up the list and return same to us with the architect's approval. As soon as this is received by us we will prepare detailed roughing in measurements and forward copies to you as requested.

We understand that the building has not progressed as rapidly as was expected and that the fixtures will not be required much before October 1st. At any rate, we have notified our works tentatively to prepare for this date.

Trusting the above will meet with your approval, we remain,

Yours very truly,

THE J. L. MOTT IRON WORKS,
WILLIAM E. McGOWAN,
*Hospital Department.*

W.E.M./M.

Copy to Mr. Horne.

64 EXHIBIT B.

Aiken, S. C., 8-28-16.

J. L. Mott Iron Works, New York City.

GENTLEMEN:

Please send in roughing measurements at once.

Respectfully,

KAISER COMPANY.

EXHIBIT C.

August 31, 1916

The H. B. Kaiser Company, Opera House Building, Aiken, S. C

GENTLEMEN:

In re Fixtures for Aiken Hospital.

Your favor of the 28th inst. requesting roughing measureme has been received. As we advised you in our letter of August 9 we have had the question of fixtures up with the architects, Mes Hoppin & Koen, and have received from them certain modificati which will cause changes to the fixtures in your order.

They have requested us to prepare a new list, submitting sa to them with illustrations of the various fixtures. Copy of this and illustrations, which we expect to have ready the early part the coming week, will be sent to you with the roughing measu ments.

Trusting this will be satisfactory, we remain,

Yours very truly,

THE J. L. MOTT IRON WORKS
WILLIAM E. McGOWAN,
*Hospital Department*

W.E.M. M.

Copy to Mr. J. B. Horne.
Copy to Mr. L. Plach.

65 EXHIBIT D.

September 19, 1916

Messrs. H. B. Kaiser Co., Aiken, S. C.

GENTLEMEN:

Re Aiken Hospital.

In response to our letter of September 15th to Messrs. Hoppin Koen, architects, copy of which we enclose herewith, and whi replied to their favor of September 13th, we received the followi letter dated September 16 from them:

"We beg to acknowledge your letter of the 15th noting the rece of our communication of the 13th inst., returning to you one co of your revised list of August 8, 1916, describing fixtures which y are preparing on the order of the H. B. Kaiser Co. for the above wo and will expect to receive the corrected list and set of illustrations noted."

On account of the number of changes to your original order, whi affects the price of the fixtures, we enclose herewith duplicate of

interpretation of the present requirements, which we would ask you to go over item by item very carefully and return one list to this office with your approval or any corrections you may find necessary.

Roughing measurements and illustrations of the fixtures as we understand they are now required are being prepared and will be forwarded to you in the next few days. In order that there be a thorough understanding between ourselves, we wish to enumerate the price of your original order, $2,335; extra for changes in the amount and type of fixtures, $30.50, making the present amount of your order $2,365.50, which we trust you will find correct.

When returning one copy of the enclosed list with your approval, will you kindly advise us the approximate date when shipment of goods will be required?

Awaiting your advice, we are.

Yours very truly,

THE J. L. MOTT IRON WORKS.
WILLIAM E. McGOWAN,
*Hospital Department.*

W.E.M./H.

56 Attached to Exhibit "D" upon the letterhead of the J. L. Mott Iron Works appears a list of articles to be furnished, comprising six typewritten pages, headed as follows, in typewriting:

"New York, July 18, 1916.

"Revised August 8, 1916.

"Second Revision September 15, 1916.

H. B. Kaiser Co., Aiken, S. C.

"When to ship—Get ready for October 15, 1916, definite date later."

Printed on said heading is the following:

"NOTICE.—We send you two copies of your order as we understand it. Please check each item and combination and correct or fill in what you deem proper. Sign your name after the word 'Approved' at the end and return one of the copies to us immediately.

"THE J. L. MOTT IRON WORKS."

Then follows upon said six typewritten pages a list of articles to be shipped, which checks exactly with Exhibit "A," Schedule "A" of the complaint, except that after the expression on the fourth page thereof, "Plate 64-H," the following appears:

"3 Vitreous Clinic slop sinks.
3 N. P. cleansing jets.
3 Vitreous trap-standards, with bolts and porcelain bolt caps.
3 N. P. combined standards and jet supply.

3 Sets combination supply valves with china indexed handles, for jet control supply to flush rim and supply to nozzle; nozzle to be fitted with pail hook and brace to wall; faucet and jet control as plate 40-H with 805-R flush connections.

67 3 N. P. brass 1½" flush connections with coupling nuts and lower bends to connect with spud of sink.

3 Rough brass floor flanges with bolts and porcelain bolt caps. Plate 38-H as described with special supply fittings."

At the end of said six typewritten pages the following appears:

"We will furnish the above described fixtures for the total net sum of two thousand three hundred and sixty-five and 50-100 dollars ($2,365.50), f. o. b. Trenton, N. J.

"Terms: Net cash.

"THE J. L. MOTT IRON WORKS.
"Per WILLIAM E. McGOWAN.

"Approved ——.
"Dated ——.
"Signature —— ——."

EXHIBIT E.

Aiken, S. C., 10-10-16.

J. L. Mott Iron Works, Plumbing Dept., New York City.

GENTLEMEN:

Please forward floor drain for operating room at hospital, Aiken, S. C., and oblige,

Your truly,

KAISER COMPANY,
P. WEATHERFORD.

EXHIBIT F.

October 10, 1916.

Messrs. H. B. Kaiser Co., Aiken, S. C.

GENTLEMEN:

Re Fixtures for Aiken Hospital.

We should be pleased to receive a reply to our letter of September 19th, in which we sent you duplicate copies of our interpretation of the present requirements for your order for plumbing fixtures in the above building.

68 Will you kindly return to us one of these copies with your approval and any correction necessary? Also give us the date when the fixtures will be required.

Yours very truly,

THE J. L. MOTT IRON WORKS.
WILLIAM E. McGOWAN,
*Hospital Department.*

W. E. M.: H.

EXHIBIT H.

October 19, 1916.

Messrs. H. B. Kaiser Co., Aiken, S. C.

GENTLEMEN:

In re Aiken Hospital.

Replying further to yours of the 10th inst., we are pleased to advise you that our works have advised us that they are shipping the floor drain for the operating room today.

Can you at this time give us the approximate date when you will require the balance of the fixtures? Will you not also return to us one copy of our interpretation of your requirements of this order?

Yours very truly,

THE J. L. MOTT IRON WORKS.
WILLIAM E. McGOWAN,
*Hospital Department.*

W. E. M./H.

EXHIBIT I.

October 21, 1916.

The Kaiser Plumbing Company, Aiken, S. C.

GENTLEMEN:

We herewith enclose you final invoice, dated October 11, $231.88, in connection with the Iselin job, which, as noted on recapitulation, aggregates $678.

While the architects, Messrs. Hoppin & Koen, New York, were to arrange that we be paid, yet, nevertheless, we think that the matter of payment should be well understood between you and us.

Therefore, we enclose you herewith our Form A in triplicate, which is in the shape of an order on Messrs McGhee&McGhee, the general contractors, which please sign. One of the three you may retain for yourselves, another may be retained by Messrs. McGhee & McGhee, and the face copy is to be sent to us after accepted by Messrs. McGhee & McGhee.

We have an additional order from you for fixtures for the hospital at Aiken, S. C., of which also Messrs. McGhee & McGhee are the general contractors—$2,365.50.

We understand that early shipment is to be made of this; but before we ship you should also sign the enclosed set of Form A and get the acceptance of Messrs. McGhee & McGhee thereon and transmit the same to us.

We trust that you will understand the matter thoroughly and that you can act promptly; but if you do not quite understand all do not hesitate to write us, and we will be pleased to explain further.

Yours truly,

MAX GOEBEL,
*Secretary.*

M. G./B.

Final invoice, October 11, $231.88.
Recapitulation, $678.
Form A in triplicate, $678.
Form A in triplicate, $2,365.50.

EXHIBIT "I-*a*."

Attached to Exhibit "I" were two forms, one in the case of the C. Oliver Iselin job referred to in the letter, with which this action is not concerned, and one in the case of the hospital job; the latter being a proposed order to be signed by the Kaiser Company and to be addressed to McGhee & McGhee for the payment of $2,365.50, out of Kaiser Company's contract money to be earned in the building of the hospital; said order also comprised an agreement on the part of McGhee & McGhee to reserve said sum of money and to pay the same to Mott Company upon completion of furnishing of the fixtures.

70 EXHIBIT J.

October 27, 1916.

The Kaiser Company, Aiken, S. C.

GENTLEMEN:

We wrote you on October 21st enclosing you Form A on Messrs McGhee & McGhee, the general contractors, for $678 and $2,365.50 respectively.

In order to make these orders on them and their acceptance effective we think that they in turn ought to give us orders on the architects or on the owners.

If you have not yet had them sign the instruments, or signed them, will you at the same time make the proposition to them, or shall we do so from here?

Yours truly,

GOEBEL,
*Secretary.*

M. G./B.
Please reply.

EXHIBIT K.

Aiken, S. C., 11-15-16.

J. L. Mott Iron Works, Plumbing Department, New York.

GENTLEMEN:

Please forward all fixtures for hospital job; also tank and water heater.

Yours truly,

KAISER COMPANY.

EXHIBIT L.

November 17, 1916.

Messrs. Kaiser Co., Aiken, S. C.

GENTLEMEN:

Re Aiken Hospital.

We have yours of the 15th inst. requesting us to forward all fixtures for the above job, but we have not heard from you in reply to our letters of October 21st and October 27th.

Why not?

As soon as you reply to these two letters we will arrange about shipment of the fixtures.

Awaiting your instructions, we are,

Yours very truly,

THE J. L. MOTT IRON WORKS.
WILLIAM E. McGOWAN,
*Hospital Department.*

W. E. M./H.

71

EXHIBIT M.

December 1, 1916.

The Kaiser Plumbing Co., Aiken, S. C.

GENTLEMEN:

We do not know what to think of you because you have not yet replied to our letters of October 21st, 27th, and November 17th.

As per enclosed statements, the bills for Mrs. Iselin's job, for August, September and October, $678, are past due.

As you do not answer letters, and, much less, as you probably have in addition no inclination to pay or do anything that is reasonable whereby payment may be obtained or secured, we hereby notify you that unless we hear from you on or before the 5th inst. we shall make draft on you at 1 d/s for the $678.

Yours truly,

MAX GOEBEL,
*Secretary*

M.G./B.

Enc. statement November 1, $710.90.

EXHIBIT N.

*Telegram.*

Aiken, S. C., December 1, 1916.

J. L. Mott Iron Works, New York:

What is the hold-up on shipment of fixtures to Kaiser Company Re: Hospital? Want matter adjusted. Advise us at once by wire, being the contractors.

McGHEE & McGHEE.

EXHIBIT O.

*Telegram.*

New York, December 1, 1916.

McGhee & McGhee, Aiken, S. C.:

Reason of nonshipment is that we can get no answer to several letters written to Kaiser Company trying to arrange for guarantee of payment. Could ship in three days on satisfactory guarantee.

THE J. L. MOTT IRON WORKS.

72 EXHIBIT P.

*Telegram.*

Aiken, S. C., December 2, 1916.

J. L. Mott Iron Works, New York:

We guarantee payment amount twenty-three hundred sixty-three dollars fifty cents account Kaiser Co. shipment under contract for hospital at Aiken.

FIRST NATIONAL BANK OF AIKEN.

EXHIBIT Q.

December 4, 1916.

The First National Bank of Aiken, S. C.:

GENTLEMEN:

We acknowledge receipt of your telegram dated December 2, 1916, being as follows:

"We guarantee payment amount twenty-three hundred sixty-three dollars fifty cents account Kaiser Co. shipment under contract for hospital at Aiken."

Instead of $2,363.50, the amount for fixtures for hospital is $2,365.50.

The terms of payment are thirty days from date of shipment or invoice.

On these conditions we accept your guarantee, and we have thereupon instructed our works to make immediate shipment.

Yours truly,

MAX GOEBEL,
*Secretary.*

M.G./B.

Please affirm above.

EXHIBIT R.

Aiken, S. C., December 6, 1916.

The J. L. Mott Iron Works, New York, N. Y.

DEAR SIRS:

We wired you on the 2d inst. as follows:

"We guarantee payment amount twenty-three hundred sixty-three dollars fifty cents account Kaiser Co. shipment under contract for hospital at Aiken."

73 We understand from your letter of the 4th inst. that the amount should be $2,365.50 instead of the amount quoted in our telegram. The terms of payment stated in your letter are understood and satisfactory.

We thank you for your prompt attention in this matter.

Respectfully,

G. A. DURBAN,
*Cashier.*

EXHIBIT S.

December 7, 1916.

The Kaiser Plumbing Co., Aiken, S. C.

GENTLEMEN:

As you failed to respond to ours of the 1st inst., we have this day made draft on you through the First National Bank of Aiken for the overdue account in relation to bills of August 19, September 29 and October 11, aggregating $678.

We expect that you will duly meet this draft.

As to the fixtures for the city hospital—$2,365.50—we received a telegram from the First National Bank of Aiken dated the 2d inst., in which it guaranteed payment for the fixtures.

In consequence of this guarantee, we have instructed our works to make shipment as soon as possible.

Yours truly,

MAX GOEBEL,
*Secretary.*

M.G./B.

EXHIBIT T.

December 7, 1916.

The First National Bank of Aiken, S. C.

GENTLEMEN:

We affirm our respects of the 4th inst. in relation to your guarantee of payment of fixtures ordered by the Kaiser Company for the City Hospital—$2,365.50.

Today we beg to enclose you a draft on the Kaiser Plumbing Company at 1 d/s for $678, which is for a past due account for fixtures which were furnished for the residence of Mr. C. Oliver Iselin.

74 Will you be good enough to present the draft at once, see to the collection of it, and make to us returns as is customary?

Yours truly,

MAX GOEBEL,
*Secretary.*

M.G./B.
Enc. Draft December 7, $678.

EXHIBIT U.

December 27, 1916.

Mr. George A. Durban, Cashier First Natl. Bank, Aiken, S. C.

DEAR SIR:

We duly received your favor of the 6th inst. agreeing to the modification of your guarantee for plumbing fixtures ordered by the Kaiser Plumbing Company for the hospital at Aiken to $2,365.50 and agreeing on the terms.

We received another order from them for a heater for the same job amounting to $354.50.

Before we can ship the same it also requires a guarantee.

Will you furnish this guarantee?

We have written to the Kaiser Plumbling Company about it, but as they do not usually attend to correspondence, we take the liberty of mentioning the matter to you, as you may be interested.

On December 7th we mailed you on the same parties a draft for collection for $678. You have not made us any returns on the same as yet. Why not? Have the plumbers not been paid by Mr. C. Oliver Iselin for the material we furnished? If not, could you not induce them to give us an order on Mr. Iselin and return us the draft?

Yours truly,

MAX GOEBEL,
*Secretary.*

EXHIBIT V.

Aiken, S. C., 1-1-1917.

J. L. Mott Iron Works, Hospital Dept., New York, N. Y.:

Some time in the early part of December, 1916, we had the First National Bank of Aiken guarantee shipment of $2,-
75 365.50, with the understanding that goods were already packed and ready for shipment. We find that you have made two shipments. Neither has arrived as yet. We certainly expect additional time on our guarantee.

We would like very much to have you have Bradstreet or Dun, or any other commercial agency, to look into the financial condition of Kaiser Company, and we think after that you will be glad to ship anything that we might order. We are of the opinion of what information we have in hand as to the tank we ordered and the brass tank heater were included in the $2,365.50 when guaranteed. Kindly give us an answer at once, as your concern has caused great delay in different contracts.

Yours truly,

KAISER COMPANY,
Per W.

EXHIBIT W.

Aiken, S. C., January 2, 1917.

The J. L. Mott Iron Works, New York, N. Y.

GENTLEMEN:

Answering your letter of the 27th inst. with regard to guarantee on an order received from Kaiser Company for $354.50, I beg to advise you that we will not guarantee this order.

The draft mentioned in your letter was paid on December 14th and we remitted for same on that day.

Respectfully,

G. A. DURBAN,
*Cashier.*

EXHIBIT X.

January 11, 1917.

The Kaiser Company, Aiken, S. C.

Re Hospital at Aiken, S. C.

GENTLEMEN:

Replying to yours of the 1st inst., we have requested our works to notify the railroad company to have the shipments of fixtures which left Trenton on December 11th and December 12th traced by wire, which, we hope, will expedite delivery.

76 The only reason we can offer for the delay in the arrival of the goods at their destination is the congested condition of all freight shipments along the Atlantic seaboard, but we trust that by tracing by telegraph this situation will be relieved in your case.

We do not understand your statement that in your opinion the storage tank and heater were included in the price of $2,365.50, which was guaranteed by the First National Bank at Aiken, S. C.

This tank and heater was not included in your order dated June 21, 1916, which amounted to $2,335, and which, owing to the changes made in the construction of the building, the following additions and deductions were made to your order:

N. P. 2" cast iron brass traps were required instead of rough brass originally specified for the three galvanized Beekman sinks.

1 30x20" porcelain enameled iron Beekman sink as Plate 73-A.

2 24x17" porcelain enameled iron drain boards with brackets for the galvanized Beekman sinks.

2 Plate 64-H 27" Tremont lavatories; vitr-ous center standards for all the Veritas lavatories.

Were added:

2 30" ash drain boards.
1 Wentworth washtub.
1 20x19" Veritas lavatory.

Were omitted:

The fittings for the three citreous Clinic slop sinks were changed.

These changes increased the amount of your order to $2,365.50, as explained in our letter to you of September 19, 1916, at which time we sent you duplicate copies of our interpretation of your requirements at that time, and which you have up to date failed to return.

77 As to the delay caused to the different contractors, we can only refer you to our repeated attempts to secure from you a date when the fixtures would be required at the building. We refer you to our letters of September 19th, October 21st, 27th, November 17th, December 1st, and to all of which you failed to reply. We received no word at all until the general contractors, Messrs. McGhee & McGhee, telegraphed us to inquire the reason for the delay, and it was not until December 4th when the First National Bank at Aiken, S. C., gave us a satisfactory reply.

We will continue to keep after the railroad company with the expectation that the fixtures will arrive at destination in a short time.

The balance of your letter will be answered by our secretary.

Yours very truly,

THE J. L. MOTT IRON WORKS.
WILLIAM E. McGOWAN.

EXHIBIT Y.

January 12, 1917.

The Kaiser Co., Aiken, S. C.

GENTLEMEN:

We desire to make reference to the letter that was written you yesterday by our Hospital Department explaining to you that the price of your additional order for

1 No 26 Sunray heater with brass water parts,
1 Extra heavy black steel storage tank, 42 x 84" manhole and regular toppings,
1 Regulator, $354.50,

is not included in, and does not form a part of, your order for plumbing fixtures, $2,365.50, the payment of which has been guaranteed by the First National Bank of Aiken, S. C.

Thus, if you want shipment made of the heater, etc., it is necessary that you affirm that this is an additional order separate from the other amount, and that the payment of this additional amount is likewise guaranteed.

In your letter of the 1st inst. you say that you would very much like us to refer to Bradstreet or Dun, or any other commercial agency, and look into the financial condition of the Kaiser Company, and that you think thereafter we will be glad to ship you anything that you might order.

By this you probably mean that we would ship you anything that you might order on open account without guarantee.

We did before as you suggested, and made inquiries about you, but those inquiries and the reports we got would not warrant or indicate that you were entitled to credit on open account to any great extent.

If, however, you think that the information given about you is erroneous, and that you are worthy of credit, then for this purpose we would ask you to fill in one of the enclosed property statement blanks, sign it and mail it to us. The statement by you thus made we will give the best consideration, and if the statement warrants we will be pleased to open an account for you as a regular line of credit on net cash, 30 days, and not to exceed 60 days.

We would also like to remark herewith that heretofore we have had considerable difficulty in getting any answer from you to numerous letters we had written you. You do not seem to pay any attention to your correspondence, which is certainly bad business, leading to bad impressions.

Yours truly,

MAX GOEBEL,
*Secretary.*

M. G./B.

Enc. two property statement blanks.

EXHIBIT Z.

Aiken, S. C., 1-16-17.

The Mott Iron Works, New York, N. Y.

GENTLEMEN:

Re Aiken Hospital.

FIXTURES for hospital arrived with the following material short.

12 pairs N. P. Bronx lavatory faucets.
79 12 N. P. 3/8" nipples for supplies to basin.
4 2" N. P. escutcheons for taps to sink.
1 Ash drain boards for kitchen sinks with telescopic legs, size 36" x 26".
3 Slip joint nuts for spud to clinic slop sink.
2 Pairs N. P. tub supplies for Layton bath.
1 2" N. P. nipple for trap to surgeon's sink in operating room.

Kindly forward this material at once, as we do not want any more delays; also ship us one 20 x 19" Veritas lavatory, one 30 x 20" Beckman galvanized sink. These two articles were broken in transit. And oblige.

KAISER COMPANY.
Per W. H. W.

EXHIBIT AA.

*Telegram.*

Aiken, S. C., January 30, 1917.

J. L. Mott Iron Works, New York.

Please advise as to when shipment will be made on list of shortage for hospital job Aiken. This shortage has tied up the job. Answer.

KAISER CO.

EXHIBIT BB.

*Telegram.*

New York, January 30, 1917.

Kaiser Company, Aiken, S. C.:

Lavatory faucets shipped January sixteenth, drain boards January twenty-sixth, other fittings your letter January sixteenth included shipments December eleventh and twelfth. Shipping lavatory and sink to replace those broken in transit tomorrow. Mail us immediately bill of lading original shipment for railroad claim.

THE J. L. MOTT IRON WORKS.

W. E. M./M.

Charged Mott Iron Works.

80 EXHIBIT CC.

January 30, 1917.

The Kaiser Company, Aiken, S. C.

GENTLEMEN:

Re Hospital at Aiken, S. C.

Upon receipt of your day letter today we immediately communicated with our works for a report on the material which you advised us was not received with the fixtures for the above building, and wired you by night letter as follows:

"Lavatory faucets shipped January sixteenth, drain boards January twenty-sixth, other fittings your letter January sixteenth included shipments December eleventh and twelfth. Shipping lavatory and sink to replace those broken in transit tomorrow. Mail us immediately bill of lading original shipment for railroad claim."

We have requested our works to trace the shipment of January 16th and 26th so as to expedite as much as possible the delivery of the faucets and drain boards.

Our records show that the other material mentioned in your letter of January 16th was included with the shipment of December 11th and December 12th.

We trust that you will make a thorough search for same, and if you are not successful in locating them please send us an order and we will be pleased to duplicate these parts promptly.

The 20 x 19" Veritas lavatory and the 30 x 20" Beekman sink will be shipped from our works at Trenton, N. J., tomorrow. In order to enable us to file a claim against the railroad company, we ask you to kindly mail us at once the original bill of lading, on which we trust you have made a notation regarding the condition of these two fixtures of the original shipment when received.

Awaiting your reply, we remain,

Yours very truly,

THE J. L. MOTT IRON WORKS,
HOS. DEPT.

81 EXHIBIT DD.

Aiken, S. C., March 12, 1917.

The J. L. Mott Co., New York, N. Y.

GENTLEMEN:

We enclose letter with list of items short of the hospital fixtures. The list is a copy of the one sent you January 16, 1917, of which Messrs. Hoppin & Koen seem to think you have never received. We also are sending them a copy.

Now, gentlemen, this will be a favor if you will ship these items by express for the Kaiser Co. to us; the time of the completion of the contract is now past by ten days.

All of the above refers to the Kaiser Co. matter.

But they understand that we are taking up this matter with you. See items checked off; they have been gotten elsewhere. Ship by express and wire us at our expense day of shipment.

Yours truly,

McGHEE & McGHEE.

EXHIBIT EE.

Aiken, S. C., March 13, 1917.

J. L. Mott Iron Works, New York:

Ship Kaiser Co., hospital, ten one inch and quarter slip joint elbows N. P. complete with nuts, five forty-five same size of elbows with slip joints five feet one and quarter N. P. tubing, nuts for spuds on the three clinic slop sinks, which was one thread small. Ship at once by express. Also two galvanized iron Beekman sinks thirty by twenty, and one twenty by ninety Vitras lavatory. C. O. D. express at once.

McGHEE & McGHEE.

EXHIBIT FF.

March 13, 1917.

Messrs. McGhee & McGhee, Aiken, S. C.

GENTLEMEN:

Re Hospital, Aiken, S. C.

Immediately upon receipt of your telegram today we forwarded this order to our works at Trenton, N. J., for prompt shipment of the parts you require by C. O. D. express.

82 On the 2d inst. Messrs. Hoppin & Koen, architects, communicating with this office, advised that the Kaiser Company were waiting for us to complete their order. We were surprised at this notice, inasmuch as we had completed shipment some time back, and we had not heard from the plumbers in response to our report to their complaint about the fixtures and fittings which they claimed to have been short shipped by us, although we shipped a sink and lavatory on February 2d.

This was sent to them in letter dated January 30th, and since we did not hear from them in the meantime, we assumed that the fixtures and parts which they claimed to have been missing had since been received.

We have requested our works to telegraph us a shipping report and as soon as we receive this information we will advise you just how soon the goods ordered by you can be forwarded.

Yours very truly,

THE J. L. MOTT IRON WORKS,
HOSPITAL DEPARTMENT.

P. S.—We assume the two Beekman sinks and the one Veritas lavatory are wanted in addition to those shipped, replacing others broken in transit.

## EXHIBIT GG.

This exhibit is a letter with a statement attached under date of March 22, 1917, from the J. L. Mott Iron Works to First National Bank of Aiken requesting payment of the account of the Kaiser Co. to the J. L. Mott Iron Works, the attached statement showing the amount claimed to be due thereupon with interest to date that said statement was made.

83

## EXHIBIT HH.

Aiken, S. C., March 24, 1917.

The J. L. Mott Iron Works, New York City.

DEAR SIRS:

I have your statement of March 22d requesting that we send you check.

I beg to advise that the treasurer of Kaiser Company is the general manager, has been very ill for the past two weeks, and even now is very low, and we have been unable to see him with regard to this matter.

Just as soon as we can get a statement from him with regard to this bill we will take the matter up with you.

Respectfully,

GEORGE A. DURBAN,
*Cashier.*

### *The Judge's Charge.*

The presiding Judge, after fully outlining to the jury the contents of the pleadings, charged the jury as follows:

"The plaintiff sues the Kaiser Company, gentlemen, upon a contract which you have heard read. The plaintiff also sues the bank as a guarantor on that contract, the plaintiff claiming that it would not have shipped the goods described to the Kaiser Company until the bank guaranteed the account. It claims that when that was done it shipped the goods. In substance the Kaiser Company claims that it did sign the contract, but that the plaintiff broke the contract, and did not ship the goods, and that it was damaged, etc., and you have heard what they claim on that. Of course, the plaintiff claims that they complied with the contract and shipped the goods. The bank claims the plaintiff did not carry out its contract. The bank also goes further and says that although it did sign this guarantee for the Kaiser Company, that yet, under the laws of the United States, it is not liable. That is the meaning of the defense of the bank in this case.

84 Now, it is incumbent upon the plaintiff to make out its case by the preponderance or the greater weight of the evi-

dence. That does not necessarily mean the greater number of witnesses, because you are the judges of the witnesses, and what they are testifying about. You see the witnesses on the stand, and watch them, and the interest they seem to have in the case, and you are the judges of the documents that you have heard read also.

I charge you that as far as the legal affect is concerned that that was a valid contract. The only question is whether it was carried out or not. You are the judges of the testimony on the stand. As I started to say a minute ago, you look at the witnesses on the stand, and size them up, to use a homely expression, and try and determine who is telling the truth, and who is telling a falsehood, if anybody, and by that standard, the plaintiff must make out its case by the preponderance or the greater weight of the testimony before it can recover.

Now, as to the counterclaim, that same rule applies. A counterclaim means nothing more than a countersuit, and in establishing that counterclaim the defendant must make out the counterclaim by the preponderance or the greater weight of the evidence, before the jury can find anything in favor of the defendant on the counterclaim.

Now, gentlemen of the jury, I have listened very carefully to the law read by counsel on both sides, and according to my construction of the law—and you are to take the law as I give it to you, because if I am in error I can be corrected—you are not lawyers, and that is what a Judge is here for mainly, to give the law as he conceives it; but I charge you as a matter of law that a bank cannot indorse ordinarily. It is against the law. You go in the bank and want somebody to lend you some money, and they tell you to go and get an indorsement, and you say, "Mr. Presi-
85 dent get the money for me, this man has indorsed my note." But where the bank is benefited indirectly or directly, and does it, then it is estopped from saying it cannot. It is not only the law, but it is good morals, and that is what I take those decisions to mean which you have heard read here.

After I charge you some requests, I have something more to say, and then I will give the case to you, unless counsel calls my attention to something else later on.

On the part of the plaintiff, I charge you as follows:

1. The plaintiff alleges that it sold and delivered to the defendant, Kaiser Company, plumbing fixtures and materials to the value of two thousand three hundred and sixty-five dollars and fifty cents ($2,365.50), and if you find that the plaintiff did sell and deliver such fixtures and materials, then plaintiff is entitled to a verdict for the contract price of such fixtures and materials; and in this connection, I charge you that it appears from the written order, which has been introduced in evidence, and which it is my duty to construe, that such materials and fixtures were to be delivered, "free on board cars" at Trenton, New Jersey, for shipment to the Kaiser Company; hence, you are charged that the railroad company was the agent of the Kaiser Company in the transportation of the articles in question. If you find that the articles ordered were

delivered to the railroad, and placed on board cars at Trenton, N. J., then, under the law, the delivery in so far as the Mott Company is concerned, to the Kaiser Company, was completed by the delivery of said articles on board cars of the transportation company at Trenton, N. J.

I charge you that is good law.

2. If there was any delay or any loss of any of the goods, or any breakage of same by the railroad company in transportation from Trenton, N. J., to Aiken, South Carolina, the Mott Company would not be responsible therefor, but the Kaiser Company
86 would have the right to look to the railroad company for any redress that they might be entitled to.

I charge you that. That means this—we have to transact business that way. You order many things, and there are certain rules in regard to it. Say you order goods from Augusta to be shipped by railroad, and you ask them to ship you the goods, and they pack them up and carry them to the depot and load them, that is all that they can do then. The shipper cannot go along and follow the railroad company and board the cars and manage the goods to destination. There are certain rules the railroad company must obey and recognize, and if a man goes and puts goods on board cars, as he agreed to do according to his contract, then if there was any loss in transportation, the railroad company would be responsible, unless you made a distinct contract to the contrary. Ordinarily, if you go and order goods to be shipped you, and the shipper goes and puts them on the cars, and they are shipped, then if there is a loss in transportation or any injury to the goods, you look to the railroad company—the common carrier—for your damages, unless, of course, there is some agreement outside of that.

3. If the Mott Company seasonably delivered to the railroad company at Trenton, N. J., the articles ordered and contracted for, they thereby completed their contract, and any delay or failure to send duplicates for articles broken or lost in transit would not avail the defendant in this action, and no damage could be charged against the Mott Company therefor.

I charge you that.

4. The plaintiff alleges that before it sold and delivered to the defendant, Kaiser Company, the plumbing fixtures and materials mentioned in the complaint, that the defendant, the First National Bank of Aiken, assumed and in writing guaranteed to plain-
87 tiff the payment of $2,365.50, the contract price of such fixtures and materials; certain papers have been put in evidence in this case, as constituting such written guarantee, and I instruct you that it is the duty of the Court to construe these papers as written evidence, and I charge you that they constitute such guarantee by the defendant, First National Bank, and if you find that this defendant is doing a banking business and that as an incident to the transaction of its business as a banking corporation

it made this guarantee and received benefit therefrom, then it cannot now deny liability to plaintiff under such guarantee; and if you further find that plaintiff did sell and deliver the plumbing fixtures and materials in question to the railroad company at Trenton, N. J., consigned to defendant, Kaiser Company, as alleged, then the defendant, First National Bank of Aiken, is liable therefor to plaintiff under such guarantee, and the plaintiff is entitled to a verdict for the contract price of such fixtures and materials against said First National Bank of Aiken.

I charge you that if you find those to be the facts.

5. Even though the Board of Directors of the First National Bank did not pass on the guarantee offered in evidence, if the bank received the benefit of the transaction as an incident to the transaction of its business, then the bank is estopped from raising any defense that the cashier had no authority to make a guarantee and to the contrary, the bank would be bound thereby.

I charge you that, gentlemen, if those are the facts.

6. The contract between McGhee & McGhee and H. B. Kaiser Company has been introduced in evidence with its assignment to the First National Bank of Aiken by the Kaiser Company, and with the agreement of McGhee & McGhee to "make all checks payable to the above bank on our contract." The jury is charged
88 that if the fixtures and materials ordered from the Mott Company to be used by the Kaiser Company were a necessary element in getting the money, they were to get through the performance of the contract with McGhee & McGhee for the hospital work, and that the same operated to the benefit of the bank in increasing the value of its security as an incident to its banking business, then the bank's guarantee would be valid under the law, and a verdict should be rendered against the bank for whatever amount the jury finds that the Kaiser Company is due to the Mott Company.

I charge you that.

7. Under the statute law of the State of South Carolina, any and all claims against any and all corporations bear legal interest from the expiration of thirty days after the day that said claims are due and payable. Hence, as it is admitted in the pleadings, that both of the defendants are corporations, the jury should add to such amount as they may find due, by either of the defendants to the plaintiff, interest at the rate of seven per cent, the same commencing to run thirty days from the date that the jury finds the account in question fell due, as against said defendants, or either of them.

I charge you that.

Those requests are from the plaintiff, and I charge them.

Now, for the defendants, I have the following requests to charge: I refuse the first request, Mr. Stenographer.

2. The jury is charged that the accommodation guarantee on the part of an officer or of officers of a bank created under the National Banking law, looking to the enlargement of the patronage of the

bank, or favor, or profit to the person the guarantee is made
89 for, is not such a benefit as will prevent a guaranty by a National bank from being avoided.

I charge you that.

3. The jury is charged that when a National bank cashier, or any officer of the National bank, makes a guaranty for goods, wares and merchandise, the bank can refuse when in their opinion it will be improper or unjust to the bank or stockholders or depositors to perform, unless the guarantee was made for the protection of its own rights, or as an incident to the transaction of its business.

I charge you that. I repeat to you, gentlemen, it is not contended that ordinarily a bank president or cashier can go and indorse promiscuously, but if the doing of it is a matter incident or connected with its business, and to the transaction of its own business, if an officer does go and do that then the bank is bound according to my construction of the law. That is the meaning of that, and it is for you to say.

4. If the jury find from the testimony that a contract was assigned by the partnership, H. B. Kaiser Company, prior to the organization of the corporation, Kaiser Company, such contract would have no binding force as against the defendant, Kaiser Company, either to bind the defendant, Kaiser Company, or to prejudice the defendant bank in its right to follow its own opinion, and to refuse to perform a contract which it feels should not be performed pertaining to a matter of guaranty, unless the corporation acted under and took the benefits and assumed the burden of the partnership's contract.

I charge you that.

The other request I refuse to charge, Mr. Stenographer.

Now, to sum up and repeat, the plaintiff must make out its case by the preponderance or the greater weight of the testimony. If the plaintiff has done so, you say we find so many dollars for the
90 plaintiff or so many cents against both of the defendants or against one or the other. If the defendant, Kaiser Company, has made out its counterclaim, and it overbalances whatever claim the plaintiff is entitled, if anything, then write your verdict in favor of the defendant, Kaiser Company, or you can say we find for the defendants as a general verdict.

Mr. Henderson: I ask that the jury be instructed that in order to reach the bank, a verdict must be found against both defendants.

The Court: Yes, sir, in order to reach the bank, gentlemen of the jury, you must find against both defendants. If you find just against the Kaiser Company and not against the bank, then that lets the bank out of it. That is a matter for you to determine.

Mr. Williams: About the contract—I have a request here on that.

The Court: Another one?

Mr. Williams: I expected your Honor to cover it in the general charge, and you didn't do it.

The Court: Let me see it.

(Hands the Court a request.)

The Court: I don't think I will charge this. I think my general charge covers that.

Mr. Williams: One other point in the other side, which I think was overlooked by counsel in the preparation of the requests. The bank's position is that the Mott Company agreed to ship in three days. We want the Court to charge the jury that if they did not ship in three days they did not perform their part of the contract.

The Court: I can't go into the facts. The jury has heard the contract.

Mr. Williams: I wanted to call your Honor's attention to it on the construction of the contract.

91 The Court: I want you to take advantage of any error that I commit, but I think I have covered everything.

Mr. Williams: Then again, your Honor charged that delivery at Trenton, N. J., was delivery to the defendant. I ask you to modify that to the effect that if the plaintiff retained the title in the property, then it would not be delivery to the defendant.

The Court: I charged them that ordinarily that was delivery, but that parties could make any other contract. That is the law of transportation, and in all Circuits I try cases where there are some suits against the railroad company as to when goods were delivered, etc. Now, Mr. Williams, say you order goods from New York, f. o. b. When that is done, and the goods are delivered to the depot of the transportation company, the party from whom you order the goods has done his part, but if you make another contract that you are going to hold him responsible, and he agrees to it, or say he agrees that you are not to pay him until the goods are delivered at Aiken, then you can make the contract such as you want. It is for the jury to say.

Your verdict, Mr. Foreman, will be written on this paper called summons and complaint.

(Retires.)

*Requests to Charge on Behalf of the Defendants Which Were Refused by the Presiding Judge.*

1. That unless the jury find by the greater weight of the evidence that the First National Bank actually received into its hands monies for the plaintiff, the verdict of the jury must be for the defendant, First National Bank.

5. The jury is further charged that the defendant, First National Bank, cannot be held for anything, unless the jury finds that the bank actually received into its hands the money for the mer-

92 chandise for remittance or payment to plaintiff. In other words, no error of judgment or risks taken by the bank with

Kaiser Company, or with the contractor, and no charges or credits in their accounts, or other transactions between the defendants and McGhee & McGhee, can make the bank liable to the plaintiff, unless the bank actually received into its hands money for the account of plaintiff to be remitted or paid to plaintiff, or money actually received for the goods shipped themselves, and then you could hold the bank only for the amount actually received for plaintiff.

Also the following request was refused:

If the jury find that it was the understanding of the parties when they took the order, either an express understanding or an implied understanding, that the goods were to be delivered October 1st, 1916, and that they were to be paid for cash or on credit, the plaintiff should have made the delivery. It could not wait until after the time to perform and then try to make new arrangements and escape liability if it caused damages. If you should so find on these questions, as to time of delivery, and if the plaintiff failed to do as it agreed, if it did so agree, and if damage resulted, the plaintiff would be liable to the defendant, Kaiser Company, for such damages as naturally flowed from such breaking of their agreement to deliver.

*Exceptions.*

1. The presiding Judge erred in admitting the contract between McGhee & McGhee and the H. B. Kaiser Company, a copartnership, when the same was not proven by the subscribing witnesses, and when the same was made by a copartnership and not the defendant corporation, which was prejudicial to the bank and also to the other defendant, in that it was used as a basis for fixing liability on the bank.

93 2. The presiding Judge erred in not sustaining the motion of nonsuit as to the bank, made at the close of the testimony for the plaintiff, upon the grounds that the cashier of a National Bank cannot bind the bank on an accommodation endorsement for merchandise, and upon the further ground that the banking law of the United States did not allow a National Bank to guarantee a bill for merchandise to accommodate a patron in the distinct line of business not incidental to the banking business, and one taking such a guarantee takes it with that notice. And to hold the bank would violate the law of the United States government relative to the powers of National Banks.

4. The presiding Judge erred in allowing the witness, Williams, to refer to and introduce freight receipts and cash books with items therein, not made by him and not made in his presence, and to testify to matters therein which were not within his own knowledge, being hearsay and secondary, when the agent who made them was alive and on a mere vacation, said declarations of said witness being

highly prejudicial to the defendants, in that they were used as evidence against the defendants and they were denied the right to cross-examine the one who made the entries, especially when said witness was allowed to testify as to the custom of mailing notices when he was not there.

5. The Judge erred in allowing the witness, McGowan, to testify that he received a message on the telephone from a Mr. McCullough in the office of the architects that plaintiff proceed no further with the making of the parts needed by the defendant, Kaiser Company, when the same was hearsay and denied the right to the defendants to cross-examine said McCullough, especially so when said witness said that the said architects had no right to change the specifications without the consent of the plumbers.

6. The presiding Judge erred in excluding the letter written by plaintiff's Atlanta branch, showing the heater to be in the
94 specifications, when the genuineness of the signature was established, and also the letter from the same place showing the architects had made the change, when said letters had direct bearing upon the counterclaim on account of the breach of the contract to deliver the merchandise by the time stated, especially so when no claim of delivery at all had been made, the Judge erroneously holding that only such as was sued for could be gone into, although it was admitted that the architects had and could change the order, and said letters contained admissions against the plaintiff on the question of the delivery of the heater; it being respectfully submitted that the ruling to allow the defense to go no further than the contract was prejudicial as the heater and much of the other goods short were according to specifications of the architects, which changes all parties admitted that the architects had the right to make.

7. The presiding Judge erred in refusing the motion to direct verdict for the defendant bank, on the ground that the said bank could not be held on the accommodation guaranty of the cashier, and on the additional ground that it would be a violation of the National Banking Act to hold the defendant bank on the guaranty of the cashier of said bank for a bill of merchandise in an action on the contract of guaranty.

8. The Judge erred in charging the jury that where the bank endorsed and was benefited, directly or indirectly, then it is estopped from saying that it cannot endorse, and that it is not only the law, but good morals; whereas, he should have held that a National Bank is not estopped from pleading the invalidity of such a contract in an action on the contract of guaranty, and it is not for the jury or Judge as to what they think of the morals, when it is for the protection of the stockholders and depositors that such contracts are prohibited.

9. The presiding Judge, it is respectfully submitted, erred in charging, as requested, "that railroad company was agent
95 of the Kaiser Company in the transportation of the articles in question," and that placing the goods on board cars at Trenton, N. J., was complete delivery to Kaiser Company; whereas, he should have charged that question of delivery, under the evidence, was for the jury.

10. It is respectfully submitted he erred in charging, as requested, "If there was any delay or any loss of any of the goods or any breakage of same by the railroad company" the plaintiff would not be responsible, but Kaiser Company would have to look to the railroad company, said charge being on the facts in this case, because the Kaiser Company was required to report such to the plaintiff, who put in the claims.

11. It is respectfully submitted he erred in charging the third request of the plaintiff, "If the Mott Company seasonably delivered to the railroad company at Trenton, N. J., the articles ordered and contracted for they thereby completed their contract, and any delay or failure to send duplicate for articles broken or lost in transit would not avail the defendant in this action, and no damage could be charged against the Mott Company therefor." Said request being a charge on the facts, under the evidence, which shows that the defendant, Kaiser Company, was required to report shortages and losses to the plaintiff, who duplicated them and filed claim against the railroad company, and certainly the plaintiff could not collect the claims of the railroad company and hold the proceeds thereof without paying defendant, Kaiser, or duplicating the order, and the evidence was that some of the goods never did arrive.

12. It is respectfully submitted that he erred in charging the fourth request submitted by the plaintiff, especially that "certain papers have been put in evidence in this case as constituting such written guaranty (that the bank 'assumed and in writing guaranteed plaintiff the payment of $2,365.50) * * * and I charge you they constitute such guaranty by the defendant,' bank; and
96 if the jury find that defendant, bank, is doing banking business and as an incident to the tranaction of such business, it made the guarantee and received benefit therefrom, it cannot now deny liability under such guarantee; and if the jury further find that the plaintiff did sell and deliver the fixtures to the railroad company, at Trenton, consigned to Kaiser, defendant, bank, becomes liable on such guarantee; said request being error, in that the Judge in effect told the jury that the guaranty was made out and that it assumed payment of the amount, said question being at least for the jury, and it being further error because it invoked the doctrine of estoppel, which is inapplicable to National Banks, and contrary to the National Banking Laws; and because said request made the defendant, bank, liable irrespective of the Kaiser Company, showing that the title to the goods remained in the shippers.

13. It is respectfully submitted he erred in charging the fifth request of the plaintiff that the defendant, bank, is estopped from raising the defense that the cashier had no authority to bind the bank with the endorsement or guaranty, even though the directors did not pass on same, the error being that this is an action on contract, and the doctrine of estoppel in such a case is inapplicable to a National Bank, and it had properly raised the point of liability.

14. It is respectfully submitted that the sixth request was error, because the agreement of McGhee & McGhee was made with the H. B. Kaiser Company, and was assigned before the question of guaranty arose, and a guaranty of a bill of merchandise could not be validated thereby when the agreement was with a previous co-partnership and not connected with the defendant corporation, and said guaranty was prohibited under the National Banking Law in its beginning, in an action on a guaranty.

15. It is respectfully submitted that he erred in charging the seventh request, in that said request was inapplicable to the
97 defendant, National Bank, for the State statute did not apply to said bank and no interest could be assessed against it thereunder, and the Judge erred in charging it could.

16. It is respectfully submitted the Judge erred in refusing to charge the fifth request of the defendant which was a sound proposition of law, to wit: that unless the defendant, bank, received proceeds from the merchandise in question, no account or errors of judgment or other transactions between the defendants and the contractors could render the bank liable, said proposition of law being applicable to the evidence.

17. The Court erred, it is respectfully submitted, in refusing to charge the request of the defendants, last set out in the case, to the effect that if the plaintiff agreed to deliver the merchandise on October first, 1916, either expressly or impliedly, the plaintiff should have made the delivery; that it could not wait until after the time to perform and then endeavor to make new arrangements and escape liability if it caused damage; and if the jury found the facts to be so here, they would find for the defendant, Kaiser Company, for such damages as naturally flowed therefrom. Said proposition of law being sound and applicable to the facts in this case.

18. The Court erred, it is respectfully submitted, in charging the jury, that in order to reach the bank, the jury must find against both defendants; and if they found against the Kaiser Company and not against the bank, "then that lets the bank out of it." Although he said that was a matter for the jury to determine, after his positive instruction to find against both, and his advise that "lets the bank out," this was highly prejudicial to the defendant, bank, which had a right to a verdict, even though a verdict was found against its codefendant, and if it was never bound, it would not be letting it "out."

98 19. The Judge erred, it is respectfully submitted, in his refusal to charge, as requested, that if the plaintiff did not ship in three days, it breached its agreement, when it was admitted by plaintiff that it did not perform in three days.

20. The Court erred, it is respectfully submitted, in charging that in order to show title in shipper, you had to make contract to hold shipper responsible or agree not to pay for goods until delivered, that being error as title in shipper may be shown by the course of dealing, in the absence of either contract charged by the Judge.

21. The Court erred in not granting new trial as to the bank on the ground that all the evidence showed that the contract, if any, was one of guaranty, and that the bank was not estopped from showing lack of authority to make the same, and that the cashier had not the authority to make such a guaranty contract as was attempted in the evidence.

A true copy.

[Seal Supreme Court of South Carolina.]

HARRY M. McCAW.

# The State of South Carolina

## IN THE SUPREME COURT

THE J. L. MOTT IRON WORKS, Respondent,

vs.

THE FIRST NATIONAL BANK, Appellant.

The following is the opinion of the Supreme Court of South Carolina, which was filed on the 28th day of June, A. D. 1920, the remittitur being stayed until the 27th day of July, A. D. 1920, when judgment in said court became final.

### OPINION.

Gage, A. J.:

The plaintiff had a verdict and judgment against the defendants for $2,739.42, and they have appealed.

The Cause of Action against Kaiser is upon an account for goods sold; and against the bank upon a paper writing made to guarantee payment of that account, and of the following purport:

"Aiken, S. C., 12:12 p. m.,
December 2, 1916.

J. L. Mott Iron Works, New York:

We guarantee payment amount twenty-three hundred sixty-three dollars fifty cents account Kaiser Company shipment under contract for hospital at Aiken.

FIRST NATIONAL BANK OF AIKEN."

The writing was made by Durham, the cashier of the
5 bank admittedly without the express authority of the Board of Directors to do so, and issuably with the authority of the bank's President to do so.

The execution of the paper writing arose out of the following recited circumstances, most of them admittedly true: there was building in Aiken a hospital; McGhee had the contract to build; on the 16th August, 1916, McGhee made a contract with Kaiser to install a heating and plumbing system in the building for
6 $7,800.00; Kaiser had made arrangements with the bank to borrow money to do this work at the hospital; the aforementioned contract of 16th August, 1916, was on the day of its execution transferred by Kaiser to the bank; and concurrently McGhee agreed to that transfer, and further agreed that the payments which should be due by McGhee to Kaiser on the performance of the contract, should be made directly to the bank instead of to Kaiser. On the 16th August, the bank made a loan to Kaiser to assist Kaiser to perform the contract, and
7 five other loans were made, all in August, September and October, and aggregating $4,700.00; Kaiser contracted to buy from the plaintiffs from October to January, both inclusive, goods with which to do its job, and of the value of $2,365.50; Durham knew that the goods so supplied were necessary to the accomplishment of the job, and the loan was made to Kaiser to help him perform the job; the plaintiff declined, evidenced by its telegram to McGhee, to ship to Kaiser
8 the goods contracted for unless the payment for them should first be guaranteed; upon presentation of that telegram by Kaiser to the bank the instant guarantee was executed; the bank consented that as much as $5,468.00 due by McGhee to Kaiser on the job, should

be diverted from the bank, contrary to the aforementioned agreement between the bank, Kaiser and 9
McGhee and be paid directly to Kaiser.

These are the essential facts of the case, and out of them arises any liability of the bank on its guarantee.

That is the major issue to be decided; all the other issues are of a minor character and most of them are between the plaintiff and Kaiser; none of them go to the justice of the cause so as to determine it.

It will be enlightening, however, to first dispose of such of the minor issues as need attention. The appel- 10
lant's counsel has wisely and helpfully grouped in the Brief the 21 exceptions under ten heads, and we consider these heads.

1. There is no merit in the view that the aforementioned contract of 16th August, betwixt McGhee and Kaiser and the things done under and pursuant to it, did not bind the Kaiser Company, the defendant corporation, only created on 22d, August. The co-partnership was made up of Kaiser and Weatherford; the corporation was owned by the same men and Oliveros; 11
and the last named testified that the corporation had no contract with McGhee other than that of 16th August, and he knew of that contract.

Manifestly, therefore, the corporation adopted the contract which the co-partnership had entered into.

The Kaiser Company also conducted its correspondence in part on the letter heads of Kaiser & Co. and that tended to show a succession of interest.

2. The Kaiser Company plead in defense of the 12
plaintiff's action and offered testimony to prove it that the plaintiff had greatly delayed the Kaiser Company in the performance of its contract by delayed shipments of material.

The plaintiff replied to that in evidence that five ship-
13 ments of material to the Kaiser Company had laid in the railroad office at Aiken for many days, and that on three of them the Kaiser Company had even paid demurrage charges for as long as eighteen days.

The exception is, not that the testimony was irrelevant, for it was relevant; but that the evidence of the facts lay in pencil notations made by one Smith, Station Agent of the Railroad Company, on the books of the company and on the receipts which the Kaiser Company signed to the company for the goods.

14 The notations were testified to by Williams (Smith being out of the State), who was not the Station Agent of the Railroad Company, but who had been working in the freight office for two years, and who knew Smith's handwriting.

The testimony of Williams was competent.

The fact to be proved rested in a record, made in the due course of business, and the record was proof of the fact.

15 True, the record was hearsay, but the instance is one in which hearsay is accepted.

True, too, that the record had to be vouched for out of the mouth of a witness; it is not denied that Smith, who made the record, was competent to swear to it. But so could Williams also, for all that Smith could say was that the entry was genuine, and Williams also said so much.

See 2 Wigmove, Secs. 15-25.

16 2 Jones, Sec. 320.

3. Another exception goes to the testimony of the plaintiff's witness, McGowan.

McGhee, a witness for the defendant, had testified that the work of Kaiser Company had been greatly and hurtfully delayed by the failure of the plaintiff to send certain slip-joints and ells; and that witness referred that matter to the architect. 17

McGowan, in reply, testified that the slip-joints and ells were not a part of the order; nevertheless, that when McGhee wired the plaintiff to send those articles, he directed the factory by wire to make a special order for them; but that before the same could be executed, the witness got a phone message from the architect's office saying, that McGhee had secured the parts elsewhere, and to stay any further effort to supply the parts. 18

The point of the exception is that the phone message was a mere declaration.

But McGhee testified that he had referred the alleged shortage to the architect; therefore, the phone message of the architect to McGowan was prompted by McGhee, and it was McGhee (in the person of the architect) speaking over the phone to McCullough. 19

McGhee cannot demand that his own voice shall be sworn to. The testimony was competent.

4. Yet another exception goes to the exclusion by the Court of two letters addressed to Kaiser Company by one Horne, of Atlanta, who was a representative of the plaintiff in that territory, and the person who sold the plumbing outfit which is the subject of this action.

These letters had to do with a heater for the hospital building which Horne therein proposed to supply; and the content of them is merely a description of a proposed heater and the price of it. 20

There is nothing in the letters relevant to the issues made by the pleasings; and the letters do not tend to

prove aught save the contents above suggested. They
21 were of no probative value and the exclusion of them was proper.

5. The appellant contends further that the plaintiff contracted to deliver the goods at Aiken and not F. O. B. at Trenton, New Jersey; and that delivery was not so made. That issue arises out of the charge of the Court, which was that when the plaintiff put the goods into the hands of the Common Carrier at Trenton, under a contract with the Kaiser Company, expressed in the
22 written order to sell it, the goods, F. O. B., at Trenton, then that putting was into the hands of the Kaiser Company.

The appellant does not deny so much, but contends that the conduct of the parties towards each other in the execution of the sale shows that they intended that the goods should be put down at Aiken before the Kaiser Company should become liable to pay therefor.

The only two circumstances to which the appellant points to prove so much, are these: Weatherford tes-
23 tified "when we would have a claim against the transportation company we forwarded to the plaintiff the original bill of lading and let them make claim;" and the Kaiser Company discovered on the packing sheets these words, "Should there be any shortage such must be reported to the J. L. Mott Iron Works immediately."

But it is plain that these circumstances only tend to show that the plaintiff intended to expedite a speedy performance of the contract of sale.

24 6. The bank is plainly liable for interest from the day on which the Kaiser Company was due to pay for the goods.

That was the primary contract; and the guarantee was secondary to it. The telegram guaranteed the

payment of a specific amount it is true; but when was such payment to be made?

Manifestly, when the debt of Kaiser Company to the plaintiff fell due, for the guaranty refers to the "shipment under contract for hospital."

But, more than that, when the bank sent the guaranty the plaintiff answered that, "The terms of payment are thirty days from date of shipment of invoice;" to that the bank replied, "The terms of payment stated * * * are understood and satisfactory."

7. Let the defendants request to charge printed at folio 366 of the case be reported; it was refused, and that is a ground of exception.

It is true that had the plaintiff contracted with the defendant, Kaiser Company, to deliver the goods certainly on 1st October, nothing else being done by the parties thereabout, then the plaintiff would be held to the strict performance of the contract.

But the testimony abundantly shows that there was much else done thereabout by both the parties after 1st October, and for that reason the Court was wise not to hold the litigants down arbitrarily to a fixed date of delivery.

8. When the Court had concluded the charge, this colloquy took place: "Mr. Henderson: I ask that the jury be instructed that in order to reach the bank, a verdict must be found against both defendants.

The Court: Yes, sir; in order to reach the bank, gentlemen of the jury, you must find against both defendants. If you find just against the Kaiser Company and not against the bank, then that lets the bank out of it. That is a matter for you to determine."

The appellant's exception and argument thereabout is that so much "was a charge on the facts."

29 But the instruction plainly meant that before either party defendant could be held liable, there must be a verdict against that party; and so much was not a charge on the facts.

9. And at the close of the charge this other colloquy occurred:

Mr. Williams: One other point in the other side, which, I think, was overlooked by counsel in the preparation of the requests. The bank's position is that the Mott Company agreed to ship in three days. We want
30 the Court to charge the jury that if they did not ship in three days, they did not perform their part of the contract.

The Court: I can't go into the facts. The jury has heard the contract.

This action of the Court is made a ground of exceptions.

But the plaintiff did not contract with the Kaiser Company or with any other person to ship in three
31 days; that assumption arises out of a telegram sent by the plaintiff to McGhee and McGhee on 1st December, and reading as follows: "Reason of non-shipment is that we can get no answer to several letters written to Kaiser Company trying to arrange for guarantee of payment. Could ship in three days on satisfactory guarantee."

10. We revert now to the major issue first circumstantially set out.

32 The bank is clearly liable on the guaranty. It is true that generally a cashier, or, for that matter, any other agency of a bank corporation, has not the power to guarantee contracts of the instant character which third persons have entered into.

But circumstances alter cases, and the circumstances which we before recited made a case where the bank in law and in good conscience ought to respond.

It is plain that upon occasion it may be to the monetary interest of a bank to guarantee the performance of a contract of others, the bank may be in danger of serious loss, and the way to save itself may be to come to the rescue of those who have gotten into its doors. Such a guarantee is denominated a transaction incident to the performance of its business of banking; it falls into the way of the bank, the bank does not go out of the way after it.

That rule, applied to the circumstances of this case, vindicates the instant guaranty. We again advert to the circumstances.

The Kaiser Company were customers of the bank; the company had limited resources and had undertaken a "pretty big job"; it could supply the labor, but it could not supply, unaided, the material for the job: the bank was in the business of lending money to its customers; it loaned money to the Kaiser Company, as much as $4,700.00 in the summer and fall of 1916, and on the day it made the first loan, and concurrently therewith, and concurrently with the execution of the contract of 16th August (between McGhee and Kaiser) Kaiser transferred that contract to the bank and concurrently therewith the bank consented thereto.

The cashier testified to the incident of making the guaranty, he said, "Mr. Oliveros, an officer of the Kaiser Company, came to me with a telegram from plaintiff to McGhee, and stated that this stuff was ready for shipment, and that it had to be guaranteed before he could get it out; that was the sense of it. After I got this information from Mr. Oliveros, and while he was

standing there with that telegram in his hand, I sent
87 in the telegram guaranteeing the account. I don't know how long it was after that, but I think it was sometime during the same day"; and the Kaiser Company testified practically in the same words.

So that it is plain, the bank wrapped up in its legitimate business of loaning money to the Kaiser Company, and to secure those loans, the assigned contract of 16th August and to get material to complete that contract which it held, and to make it of some value, it guaranteed the payment of the purchase price of the material.

88 It would be idle to discuss the numerous cases which have been cited; there is no doubt about the general rule of law we have stated; the chief thing to be done is to apply that rule to the facts of this case.

The judgment is affirmed.

We concur:

EUGENE B. GARY, C. J.,
D. E. HYDRICK, A. J.,
R. C. WATTS, A. J.,
89 T. B. FRASER, A. J.

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AUTHENTICATION OF RECORD.

I hereby certify that the above and foregoing, with the Brief annexed, is a complete and correct transcript of the record of the above case in the Supreme Court of South Carolina, now on file in this office.

HARRY McCAW,
40 (Seal) Clerk of Supreme Court of S. C.

109 Office of the Clerk Supreme Court of the State of South Carolina.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated December 9th, 1920.

[Seal Supreme Court of South Carolina.]

HARRY McCAW,
*Clerk of the Supreme Court of the State of South Carolina.*

110 UNITED STATES OF AMERICA:

In the Supreme Court of the United States of America, October Term, 1920.

No. 594.

THE FIRST NATIONAL BANK OF AIKEN, Petitioner.

vs.

THE J. L. MOTT IRON WORKS, Respondent.

*Agreement of Counsel.*

It is agreed between counsel for Petitioner and Respondent that the certified transcript of Record on file in the Supreme Court of the United States in the above entitled case be taken as and in lieu of the return to the Certiorari to the Supreme Court of South Carolina, granted on the 22nd instant.

JOHN F. WILLIAMS,
W. S. NELSON,
*Attorneys for Petitioner.*
D. S. HENDERSON,
HENDERSONS,
*Attorneys for Respondent.*

November 30th, 1920.
Columbia, S. C.

I, Harry McCaw, Clerk of the Supreme Court of South Carolina, do hereby certify that the stipulation of which the foregoing is a true copy is on file in the office of the Clerk of the Supreme Court of South Carolina.

December 1st, 1920.

[Seal Supreme Court of South Carolina.]

HARRY McCAW,
*Clerk S. C. Supreme Court.*

111 [Endorsed:] 594—27,951. United States of America. In Supreme Court United States. First National Bank, petitioner, vs. J. L. Mott Iron Works, respondent. Certified copy consent order. W. S. Nelson, atty. for petitioner, Columbia, S. C.

112 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Carolina, Greeting:

Being informed that there is now pending before you a suit in which The Kaiser Company and First National Bank are appellants, and The J. L. Mott Iron Works is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the Court of Common Pleas for Aiken County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby com-
113 mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of November, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

114 [Endorsed:] File No. 27951. Supreme Court of the United States, October Term, 1920. No. 594. The First National Bank of Aiken vs. The J. L. Mott Iron Works. Writ of certiorari. Supreme Court of South Carolina, clerk's office, Columbia, S. C. Filed Dec. 1, 1920. Harry McCaw, clerk.

115 [Endorsed:] File No. 27951. Supreme Court U. S., October Term, 1920. Term No. 594. The First National Bank of Aiken, petitioner, vs. The J. L. Mott Iron Works. Writ of certiorari and return. Filed Dec. 11, 1920.

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~~No. 594~~

MOTION, NOTICE, PETITION AND BRIEF

# Supreme Court of the United States

OCTOBER TERM, 1920.

No._____

THE FIRST NATIONAL BANK,
*Petitioner,*

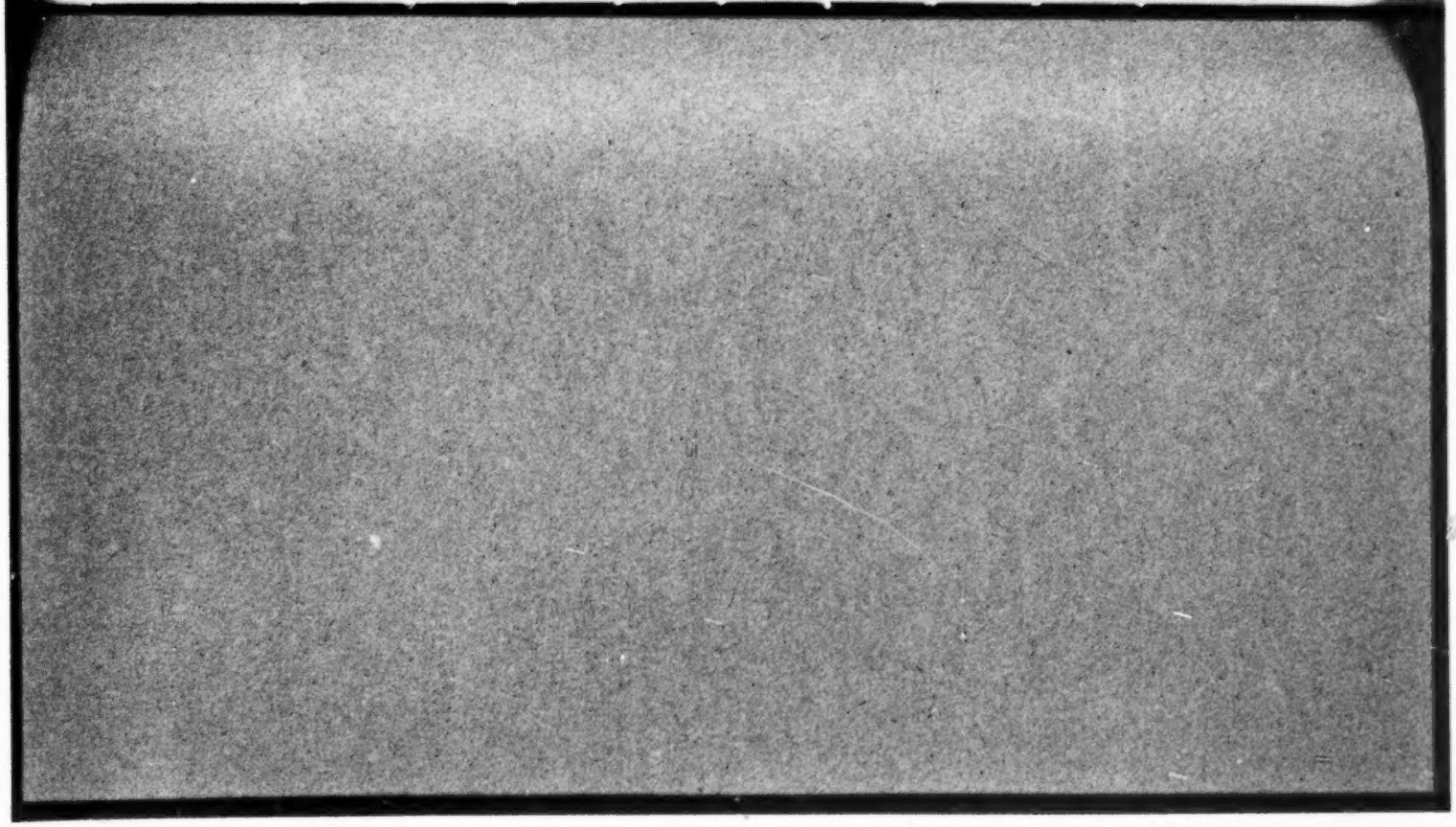
*vs.*

THE J. L. MOTT IRON WORKS,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Wm. S. NELSON,
JOHN F. WILLIAMS,
Counsel for Petitioner.

EARY PRINTING CO., COLUMBIA, S. C.



## MOTION, NOTICE, PETITION AND BRIEF

# Supreme Court of the United States

## OCTOBER TERM, 1920

No. .....

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THE FIRST NATIONAL BANK,
*Petitioner,*

*vs.*

THE J. L. MOTT IRON WORKS,
*Respondent.*

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### MOTION.

Now comes the Petition above named, the First National Bank of Aiken, by its counsel, W. S. Nelson, appearing in its behalf, and moves the Court to grant the writ of certiorari, as prayed for in the petition heretofore filed.

Wm. S. NELSON,
Attorney for Petitioner.

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### NOTICE.

P. F. Henderson, Esq., Attorney for Respondent:

You will please take notice that on Monday, November 15th, 1920, at the opening of the Court, or as soon thereafter as counsel can be heard, the above motion will be submitted to the Supreme Court of the United States.

You will please find attached hereto a copy of the Petition, of Brief in support of same, and also a copy of the Tran-

script of Record as printed in the Appellate Court of South Carolina, to be used on this motion.

Wm. S. NELSON,
Attorney for Petitioner.

The foregoing notice is hereby accepted, and delivery of a copy thereof, together with the above mentioned Petition, Brief and Transcript of Record, are hereby acknowledged this 21st day of October, 1920.

HENDERSONS, by
P. F. HENDERSON,
Attorney for Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. .....

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THE FIRST NATIONAL BANK,
*Petitioner,*

*vs.*

THE J. L. MOTT IRON WORKS,
*Respondent.*

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To the Supreme Court of the United States of America:

The Petition of The First National Bank of Aiken for a Writ of Certiorari directed to the Supreme Court of South Carolina, to bring before the Supreme Court the case of The J. L. Mott Iron Works, Respondent, against The First National Bank of Aiken, Appellant.

The said petitioner would respectfully show to this Court as follows:

1. This suit originated in the Court of Common Pleas for Aiken County, South Carolina, where judgment was rendered in favor of the plaintiff, The J. L. Mott Iron Works, and against the defendant, The First National Bank of Aiken. This judgment was affirmed on appeal to the Supreme Court of South Carolina, by its judgment filed and entered on July 25th, 1920, and the record is now in said Court.

2. The plaintiff alleged in its complaint (pg. 2, F. 7): "The defendant, The First National Bank, in writing guaranteed and agreed legally, and with due authority, to become responsible for and pay in consideration of the sale and delivery of the said merchandise, fixtures and goods to Kaiser Company, the whole amount of said bill," the bill being two thousand, three hundred, sixty-five dollars and fifty cents, for merchandise consisting of fixtures for a hospital building at Aiken, to be delivered to a plumbing company, known as the Kaiser Company. The defendant, The First National Bank of Aiken, answering the complaint, said (pg. 14, F. 55-56): "This defendant further alleges that the foregoing paragraph of this defense sets out the facts under which plaintiff claims this defendant to be liable, and it denies that it has ever been liable to plaintiff, under the laws applicable to said transaction, and under the laws of the United States; for the indebtedness of its co-defendant, and denies that it can be held so liable, or that plaintiff has any authority for claim of liability on the part of this defendant, on account of such alleged guaranty." It will be seen from the pleadings that the petitioner is a National Bank, created under the National Banking Laws of the United States.

3. There was considerable testimony introduced on the part of both parties, and the testimony developed, as will be seen by referring to the record used for appeal in the Supreme Court of South Carolina, that the respondent manufactured plumbing fixtures, and that the Kaiser Company

is a plumbing concern, who had a contract to install the plumbing in the Aiken Hospital, and that the Cashier of the appellant bank undertook to guarantee the bill of merchandise to be used by the plumbing concern, and the action was brought against the petitioner on the written guaranty, as will be seen by reference to the decision of the Supreme Court of South Carolina, the finding being, to use the Supreme Court's own language: "The cause of action * * * * against Kaiser is upon an account for goods sold; and against the bank upon a paper writing made to guarantee payment of that account, and of the following purport, etc."

4. The answer of The First National Bank of Aiken, besides pleading a denial of any liability on account of such alleged guaranty, specifically refers to the National Banking Laws, and denied liability there under, on account of the alleged guaranty, on which the respondent brought an action; and while the petitioner and the Kaiser Company were sued jointly in the State Court, the Kaiser Company's attorneys conceded that the question now to be presented to this Court does not concern or affect the Kaiser Company, and they, for that reason, waive being made a party to this proceeding; the respondent, however, has entered its judgment against the petitioner, and is endeavoring to compel petitioner to pay said judgment, interest and costs.

5. That when all the testimony was in (F. 211, pg. 53), this petitioner made its motion to direct a verdict as to the bank, on the ground that a national bank could not guarantee payment of mercantile bills, such as the one in question, and that the Cashier had no authority to bind it for such a bill as guarantor; and a similar motion was made at the conclusion of the plaintiff's testimony in the trial Court (F. 109-110, pg. 28), said motion being for a non-suit as to the bank, upon the ground that it was a national bank, and the action on the guaranty could not be maintained for the reason that the bank could not become guarantor of bills of merchandise, being unauthorized by the United States Statute, and that it could refuse to perform at any time it saw fit, and that any one who takes a guaranty from a

national bank cashier, who cannot in such case bind the bank, takes it with that notice under the law." The Court overruled the motion, saying: "It is for the jury to say what benefit the bank got out of the transaction."

6. The Judge charged the jury at the trial: "But where the bank is benefited, indirectly or directly, and does it (meaning guarantees the bill), then it is estopped from saying it cannot. It is not only the law, but it is good morals, and that is what I take those decisions to mean which you have heard read here." (pg. 85, F. 337). By reference to page 87, folio 347, the Court will see that the trial Judge used this language in his charge: "Even though the Board of Directors of The First National Bank did not pass on the guaranty offered in evidence, if the bank received the benefit of the transaction as an incident to the transaction of its business, then the bank is estopped from raising any defense that the cashier had no authority to make a guaranty, and to the contrary, the bank would be bound thereby."

The Supreme Court of South Carolina, which is the highest Court in the State that could pass on the question, said (Sub. Div., 10 of the Opinion): "We revert to the major issue, first circumstantially set out. The bank is clearly liable on the guaranty. It is true that generally a cashier, or for that matter, any other agency of a banking corporation, has not the power to guarantee contracts of the instant character, which third persons have entered into, but circumstances alter cases, and the circumstances which we before recited made a case where the bank, in law, and in good conscience, ought to respond. It is plain that upon occasion it may be to the monetary interest of a bank to guarantee the performance of a contract of others, the bank may be in danger of serious loss, and the way to save itself may be to come to the rescue of those who have gotten into its doors. Such a guaranty is denominated a transaction incident to the performance of its business of banking; it falls into the way of the bank; the bank does not go out of the way after it. That rule—applied to the circumstances

of this case, vindicates the instant guaranty."

7. This opinin was delivered on June 28th, 1920, but the remittitur was stayed until the 27th of July, 1920, when the remittitur was revoked, and the final judgment entered by the Supreme Court of South Carolina.

8. The exception that was made to the Supreme Court of South Carolina, and is made again, and now presented for the review of the judgment of the Court by the Supreme Court of the United States, is as follows, to-wit: (a) That the Judge erred in charging the jury that where the bank endorsed, and was benefited, indirectly or directly, then it is estopped from saying that it cannot endorse, and that it is not only the law, but good morals; whereas, he should have held that a national bank is not estopped, from pleading the invalidity of such a contract of guaranty in an action brought on the contract of guaranty. (b) That the trial Judge erred in his charge to the jury that the bank is estopped from raising the defense that the cashier had no authority to bind the bank with a guaranty, even though the directors did not pass on the same, the error being that this was an action on the contract of guaranty, and the doctrine of estopple in such a case is inapplicable to a national bank. (c) The trial Judge erred in refusing a motion for non-suit and to direct a verdict on the ground that the bank, being a national bank, could not be held on a contract of guaranty in an action upon the contract. (d) The Supreme Court of South Carolina erred in holding, after finding that the action was brought on the contract of guaranty, that the bank, "in law, and in good conscience, ought to respond," and that where a bank guarantees payment of a bill of merchandise for a customer, who has gotten into its doors, even though such a contract of guaranty be not in the negotiation of such papers as it is authorized to handle, such a guaranty is denominated a transaction incident to the performance of its business, the error being that the doctrine of estopple as applied by the Supreme Court of South Carolina does not apply to an ultra-vires act of guaranty in an action on the contract, and the guaranty

of a bill of merchandise for a patron of the bank who is indebted to the bank is not a transaction incidental to the business of a national bank.

9. Therefore, the practical question which is presented to the Supreme Court, and which raises the point to be considered is, where a national bank guarantees the payment of a bill of merchandise for its customer, and an action is brought on the contract of guaranty by the seller of the merchandise, can the bank plead the ultra-vires of the act of guaranty without being estopped by reason of *any* benefit, direct or indirect, received by the bank, even though such benefit be less than the amount guaranteed; and is such a guaranty incidental to the business of a national bank?

10. It is respectfully submitted that the present case is one in which it is proper for this Court to issue a Writ of Certiorari for the following reasons:

(1) Because your petitioner has been denied a title, right, privilege and immunity specially set up and claimed under a Statute of the United States, to-wit: The National Bank Law, within the meaning of the Act approved September, 6th, 1916, amending Section 237 of the Federal Judicial Code.

(2) Because the questions of law involved herein have been practically decided in petitioner's favor by former decisions of this Court, and there is a conflict between the decisions of the Supreme Court of South Carolina and the rule announced by this Court on such Federal questions.

(3) Because there is a denial to the stockholders and depositors of your petitioner, which is a national bank, of a title, right, privilege and immunity given to them under the National Banking Law, and it is a question of such great importance on account of the increasing number of national banks throughout the country that this Court ought to settle definitly the question of to what extent a national bank must respond in an action on a contract of guaranty for a bill of merchandise; and also the question of whether or not such a transaction, where the person whose bill of merchandise is guaranteed, is indebted to the bank, is for

that reason, a transaction incidental to the banking business of a national bank.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a Writ of Certiorari in this case to the Supreme Court of South Carolina, to bring up this case to this Honorable Court for such proceeding therein as to this Court may seem just.

THE FIRST NATIONAL BANK,
By Wm. S. NELSON,
Attorney for Petitioner.

October 21, 1920.

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I hereby certify that I have prepared the foregoing petition, and that the same contains correct statements founded on the record in this case, and that the petition is well founded, and the case is one in which the prayer of the petition should be granted by the Court.

Wm. S. NELSON,
Counsel for Petitioner.

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I, John F. Williams, an attorney at law of the State of South Carolina, do hereby consent for this case to proceed to the United States Supreme Court between the petitioner and respondent, with the Kaiser Company withdrawn therefrom, and the Kaiser Company does hereby waive all requirements of a party to said proceeding.

JOHN F. WILLIAMS,
Attorney for Kaiser Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

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No. .....

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THE FIRST NATIONAL BANK,
*Petitioner,*

*vs.*

THE J. L. MOTT IRON WORKS,
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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# BRIEF IN SUPPORT OF PETITION.

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Wm. S. NELSON, Attorney for Petitioner.

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## STATEMENT.

This is an action brought by the respondent against petitioner on a contract of guaranty made by petitioner's cashier, guaranteeing the payment to respondent of a bill of merchandise, said contract being a telegram, dated December 2nd, 1916, set out in the opinion of the State Supreme Court. The petitioner (being defendant below), pleaded the ultra-vires of the guaranty under the National Bank statute, said guaranty being for a bill of merchandise, and not authorized by the Board of Directors (pg. 14, FF. 55-56), and the question was raised at every stage of the trial; but judgment went against the petitioner, and on appeal the Supreme Court affirmed it.

## POINTS AND AUTHORITIES.

POINT I. Where a national bank guarantees payment of a bill of merchandise for its customer, and an action is brought on the contract of guaranty, can the bank plead the ultra-vires of the act of guaranty, without being estopped by reason of a benefit, direct or indirect, received by the bank, even though the benefit be not money or less than the amount guaranteed?

POINT II. Is such a guaranty, when the customer owes the bank, and the bank is therefore in danger of loss, an incident to the business of a national bank?

## AUTHORITIES.

*Godfrey vs. Lumber Company*, 88 S. C., 142.

Code, 1912 (S. C.), Vol. 2, Sec. 194, 197, 199.

*Farmers' & Merchants National Bank vs. Smith*, 77 Fed. 134.

*Bowen vs. Needles National Bank*, 87 Fed., 430.

*First National Bank vs. Monroe*, 32 L. R. A. (N. S.), 553.

*Appleton vs. Citizens Central National Bank*, 32 L. R. A. (N. S.) 549, and 54 L. Ed., 443 (Note L. R. A. (N. S.), 546.

*De la Vergne Company vs. German Savings Institution*, 175 U. S., 40, 58, 44 L. Ed., 65, 71, 20 Sup. Ct. Rep. 20, 25.

## ARGUMENT.

Although the Code practice prevails in South Carolina, still the modes of trial are preserved. In *Godfrey vs. Lumber Company*, 88 S. C., page 142, the Supreme Court of South Carolina said: "It was held that he had elected to enforce the contract, and that he was bound by his election, and the Circuit Decree rescinding it was set aside. So, in this case, while two remedial rights arose out of the same cause of action, plaintiffs certainly would not be allowed both remedies—damages for misrepresentation and also

rescission of the contract and restoration of the *status quo*. They are inconsistent. One is allowed on the ground that the contract has been affirmed, the other on the ground that it has been repudiated. Therefore, if plaintiff had alleged the facts and prayed for both forms of relief, or for the alternative relief of damages or rescission, they would have been required to elect which remedy they would pursue. And while, under the present system of procedure, both forms of relief are administered in the same forum, yet they require different modes of trial; for nothing is better settled by the decisions of this Court than that the adoption of the reformed procedure made no change in the inherent distinctions previously existing between actions at law and suits in equity, or in the modes of trial thereof."

The complaint that the action was on the contract of guaranty, committed plaintiff to that forum (law). The only pleading on the part of the defendant (petitioner here) could be a demurrer, when the failure to state a cause appeared on the face of the complaint (Code S. C., 1912, Vol. 2, Sec. 194); or answer where lack of cause does not appear on face of complaint. (Sec. 199, Code S. C., 1912, Vol. 22). Section 194 says: "Defendant may demur to the complaint, when it shall appear upon the face thereof" * * * * "That the complaint does not state facts sufficient to constitute a cause of action."

Section 199 says: "The answer of the defendant must contain a statement of any new matter constituting a defence." * * * *

Section 197, Code, 1912, Vol. 2, says: "When any of the matters enumerated in 194 do not appear upon the face of the complaint, the objection may be taken by answer."

Hence, when the complaint alleged that the defendant legally became bound to pay the bill, answer was the proper pleading, setting up the banking law of the United States. Therefore, the contract of guaranty was the basis of the action.

BRIEF.

As was said in the case of *Farmers' & Merchants National Bank vs. Smith*, 77 Fed., Rep. 134, "It may well be concluded that the pleader intended to rely upon a single ground of recovery, and in such case, he should be confined to the cause of action, which, upon a fair construction of the complaint, he appears to have selected." And the Court further says: "We have no doubt that it was framed solely with the view of recovery upon the guaranty, and we think it should be so construed." The Court, in this case, further says, in speaking of persons who deal with corporations of this character, "He is advised by the very nature of the action that all acts done and confirmed in relation thereto, are beyond the power of the corporation, and if he expects to hold the corporation liable for any contract or obligation entered into by the cashier, or other officer in the course of that transaction, he should at least see to it that such contract or obligation is approved by the Board of Directors or other governing body.

*Bank vs. Graham*, 79 Pa. St., 106.
*Moore vs. Bank*, 111 U. S., 156.
4 Sup. Ct., 345.
Thomp. Corp. Pa., 4754-4755."

In *Bowen vs. Needles National Bank*, 87 Fed., Rep., page 430, the Court (page 438), says; quoting from *Bank vs. Pirie*, 82 Fed., Rep., 799: "The Act of Congress under which the bank was organized confers no authority upon national banks to guarantee payment of debts contracted by third parties, and actions of that nature, whether performed by the cashier of his own motion, or by direction of the Board of Directors, are necessarily ultra-vires. A national bank may endorse or guarantee payment of commercial papers which it holds when it rediscounts or disposes of the same, in the ordinary course of business. Such power, it seems, a national bank may exercise as incidental to the express authority conferred on such bank by the National Banking Act to discount and negotiate promissory notes, drafts, bills

of exchange and other evidences of debt; but it has never been supposed that the Board of Directors of a national bank can bind it by contracts of suretyship or guaranty, which are made for the sole benefit and advantage of others. The National Banking Act confers no such authority, in express terms, or by fair implication, and the exercise of such powers by such corporation would be deterimental to the interest of depositors, stockholders, and to the public generally. (Cites cases). In contemplation of law, therefore, the venders knew, when they sold the goods in controversy, that the guaranty in question was of no avail as security, even though they supposed that it had been executed with the sanction of the Board of Directors."

In the *First National Bank vs. Monroe*, 32 L. R. A. (N. S.), 553, the Georgia Supreme Court says: "But an ultra-vires act of a corporation is not binding upon it, and it cannot ratify such an act, or be estopped from pleading it to be void under the decisions of the Supreme Court of the United States."

In the *First National Bank vs. American National Bank*, 173 Mo., 153, 158, 72 S. W., 1059, 1069, it was said: "The powers of a national bank, under the National Banking Act, are essentially matters for Federal construction and interpretation, and whatever rules may obtain in the several States as to the powers of corporations under State Statutes, all State Courts must yield to the decision of the Supreme Court of the United States, construing the powers of national banks, under the National Banking Act."

The Court then proceeds to show that the Supreme Court of the United States has decided that a national bank has no power to bind itself that a draft drawn on its customer will be paid, and when sued on such a contract, it may plead ultra-vires, and the fact that the other party to the contract has performed his part of it does not estop the bank from so pleading. The Court concludes its opinion with these words: "It will be of no profit, in this case, to consider the rule of law adopted by the several States bearing upon the power of banks, organized by authority other than the Fed-

eral Government to enter into such contracts, or to interpose the defense of ultra-vires after the other party to the contract has fully performed it, for the decisions of the Federal Courts treat all such contracts as void and unenforceable as to national banks, and this Court is in duty bound to defer to those Federal decisions." Continuing, the Georgia Supreme Court says in this case: "In *California National Bank vs. Kennedy*, 167 U. S., 362, 268, 42 L. Ed., L., 198, 200, 17 Sup. Ct. Rep., 831, 833, the Court quotes approvingly from a previous decision of that Court, the following language: "The doctrine of ultra-vires by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this Court has often recognized and affirmed upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers, the interest of its stockholders not to be subjected to risks which they have never undertaken, and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it."

In *De la Vergne Company vs. German Savings Institution*, 175 U. S., 40, 58, 55, L. Ed., 65, 71, 20, Sup. Ct. Rep., 20, 25, the Court says: "Whatever doubts might have been once entertained as to the power of corporations to set up the defense of ultra-vires to defeat a recovery upon an executed contract, the rule is now well settled, at least in this Court, that, where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a *quantum meruit*, it may be compelled to respond for the benefit actually received."

In *Appleton vs. Citizens Central National Bank*, 32 L. R. A. (N. S.), 545, (54 L. Ed., 443), the Appellate Court of New York held, to quote from syllabus, "Although a guaranty by a national bank of repayment of a loan made by a stranger to its debtor, which is larger in amount than he owes it, but out of the proceeds of which it is to receive its claim, is ultra-vires, it is liable to the lender for the sum

which it receives by reason of such guaranty." In the opinion of the Court, on page 549, the New York Appellate Court says: "A contrary rule obtains in the Supreme Court of the United States; there it is held that the execution of an ultra-vires contract by one party cannot confer upon its validity, or authorize the other party to sue on its obligation." And then the Court proceeds to show that at the same time it is held that the party cannot retain the money or property received by it under the contract, and also refuse to perform.

The case of the *Citizens Central National Bank vs. Appleton* went to the Supreme Court of the United States, and is reported in 54 Law Ed., 443, and that Court said, quoting from another decision referred to therein, "A contract ultra-vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law by permitting property or money, parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money, which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

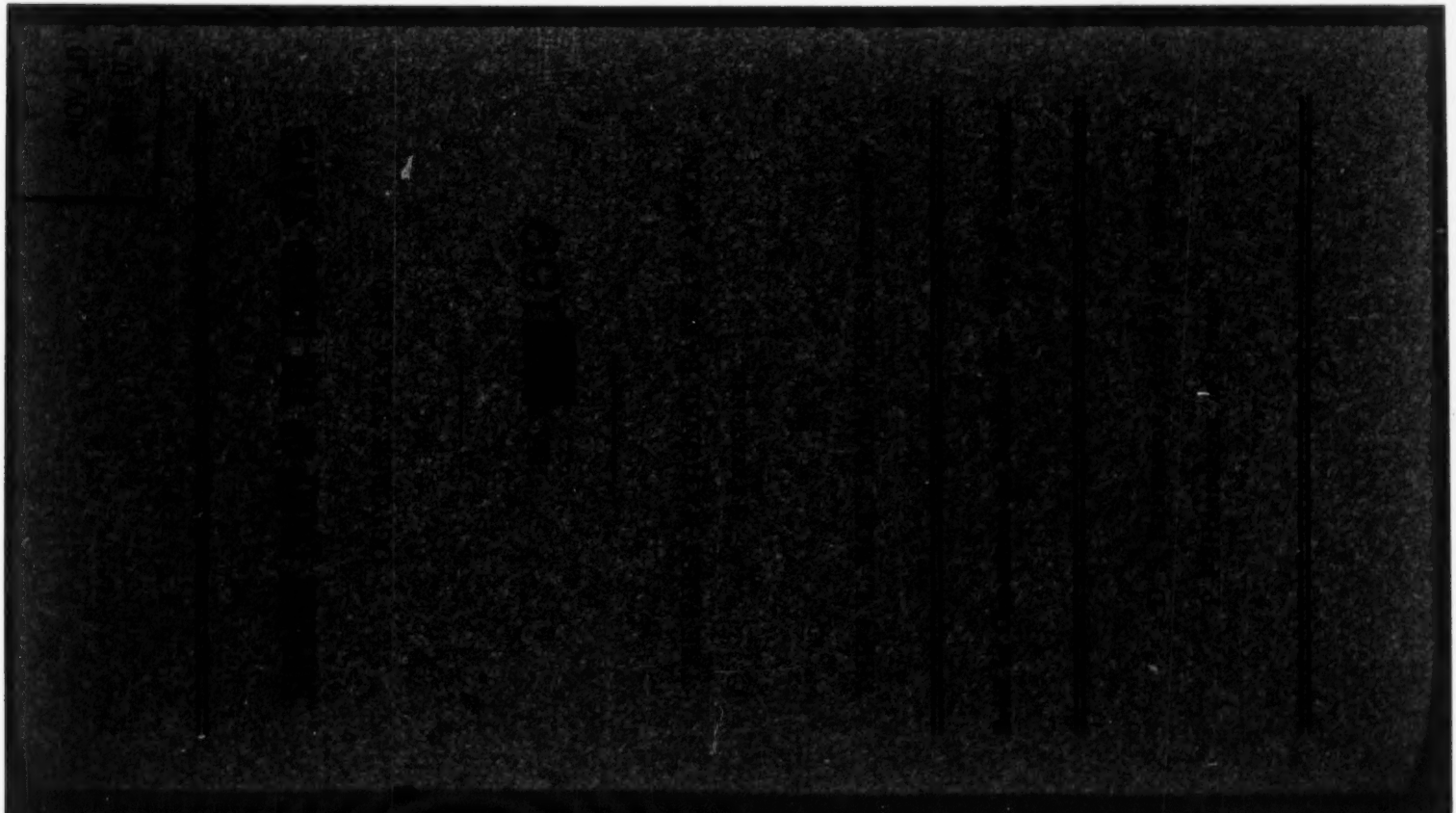
In the note to the case of *Appleton vs. Citizens Central National Bank*, 32 L. R. A. (N. S.), on page 546, it is said: "Granting that a national bank is without power to guarantee the debts of another, either in terms or in effect, the question arises, where it has received benefits as a result of the guaranty, whether it may be held responsible for the amount of benefit so received. The two cases published in connection with this point declare what seems to be two correct principles of law (referring to the Monroe and Apple-

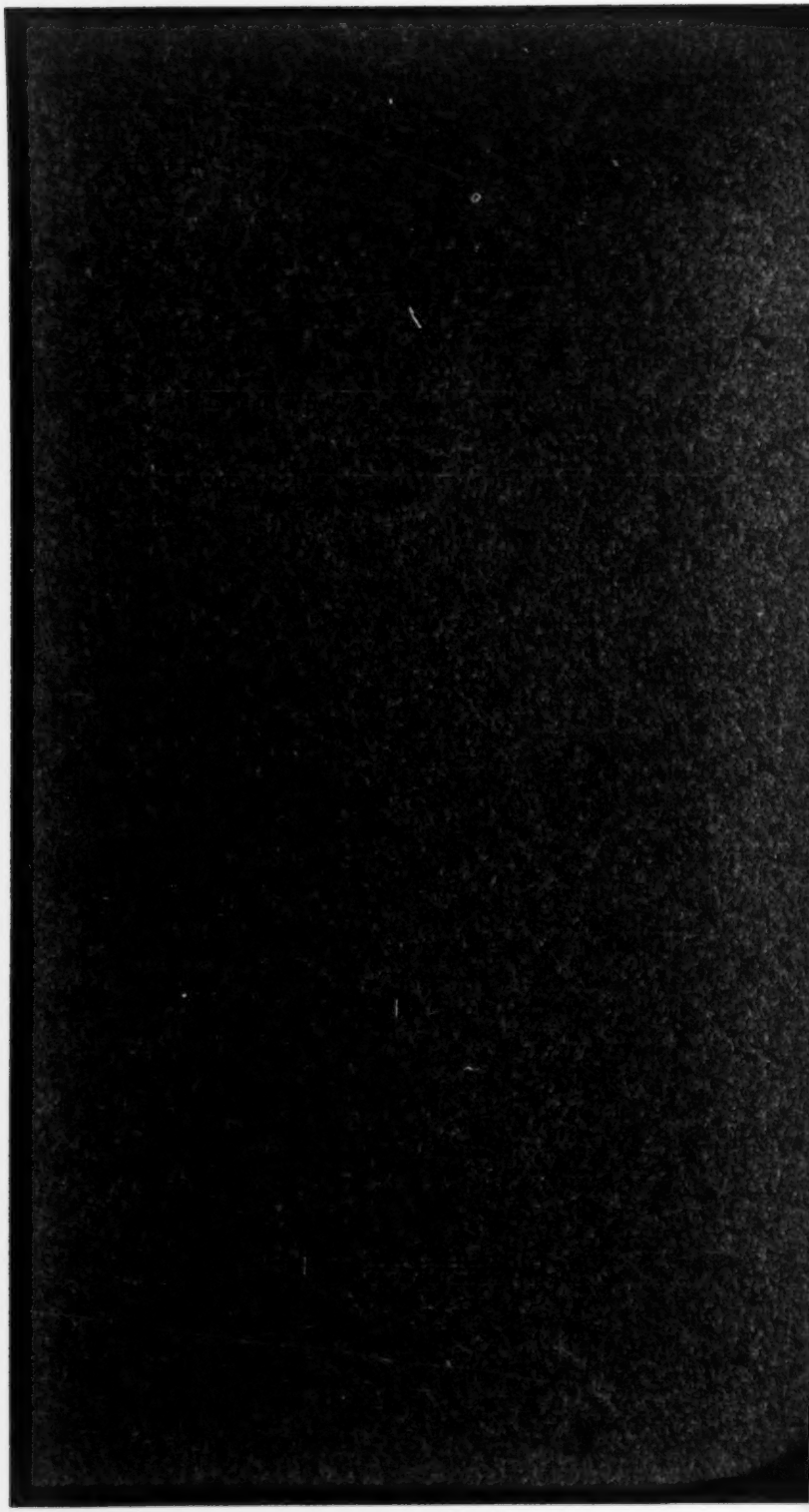
ton cases above), where the action against the bank is solely upon the guaranty; the bank is not estopped from setting up the plea of ultra-vires; and such plea is a complete defense to the action, irrespective of whether the bank has reaped any benefit from the transaction. This is the rule of *The First National Bank vs. Monroe*, Post 550. On the other hand, where the bank has reaped advantages as a result of making the guaranty, it cannot avail itself of the plea of ultra-vires to defeat its liability, at least to the extent of the benefit which it has received, where the alleged right of recovery is not based upon the guaranty, but is, for instance, grounded upon implied contract. This is the doctrine of *Appleton vs. Citizens Central National Bank*, which it will be observed, was affirmed by the United States Supreme Court, in 216 U. S. 196, 54 L. Ed., 443, 30 Sup. Ct. Rep., 364, both Courts taking care to point out that the action need not be regarded as grounded on the written contract of guaranty, but as based on an implied contract."

The second point in this case as to what is incidental to the business of a national bank in the handling of the obligations of the bank's customer, it is respectfully submitted, is determined by the National Bank Act itself, which we understand, defines the particular class of business that a national bank may do; and we submit that only such endorsements and guarantees as may incidentally follow the handling of those particular classes of paper would be denominated. Business incident to the transaction of the business; and nowhere does the Act authorize the guaranty of a bill of merchandise, either expressly or impliedly, where the customer who seeks the credit has gotten into the doors of the bank by reason of his indebtedness to the bank. This matter is discussed in the case of *Bowen vs. Needles National Bank*, 87 Fed., 430, quoted from hereinabove.

Wm. S. NELSON,
Petitioner's Attorney.

October 21, 1920.





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

**No. 594**

THE FIRST NATIONAL BANK OF AIKEN,
PETITIONER,

*vs.*

THE J. L. MOTT IRON WORKS, RESPONDENT.

**Brief in Opposition to Petition for Writ of Certiorari.**

D. S. HENDERSON, *Attorney for Respondent.*
P. F. HENDERSON, *of Counsel.*

## STATEMENT.

During 1916 McGhee & McGhee were building a hospital in Aiken. They awarded the contract for furnishing and installing the plumbing and heating apparatus and fixtures to the Kaiser Co., which concern was not financially responsible. The contract is set out at folios *222-228* of the brief used upon appeal to the Supreme Court of South Carolina. All folio references made herein are to such brief.

The testimony shows that this contract, although undated upon its face, was entered into on the 16th day of August, 1916 (f. 78), and on that day it was assigned to the First

National Bank (f. 229), and upon the same day, McGhee, the contractor, as part and parcel of the transaction wrote on the back and signed the following endorsement:

> "We hereby agree to the above transfer and agree to make all checks payable to the above named bank on this contract."

The cashier of the bank was summoned and placed on the witness stand by the respondent. The Court is requested to read over his testimony in full (ff. 63-99). The result of the same is that at the time the contract was assigned that the bank agreed to make to Kaiser Company (f. 84) a "running loan," and took this contract as collateral security therefor. That during the fall it loaned to Kaiser Co., thereupon, as much as $4,700, some of which was repaid, but that when Dec. 2d, 1916, arrived, a considerable amount was still due to the bank by Kaiser Co.; and that since this date other loans have been made upon the same security, as evidenced by the fact that checks received by the bank as a result of this transaction, after said date, has not been sufficient completely to liquidate the line of credits.

On Dec. 2, 1916, the guaranty was made to the Mott Company by a telegram of the bank. The cashier's testimony shows that when this date arrived the bank realized that in order for the contract to be completed, which would make the money available, and the contract worth something as security, that it was necessary to make the guaranty. The following is the testimony of the cashier on this point (ff. 81-2):

> "Q. 'You knew that lavatories, water tanks, and all kinds of plumbing fixtures were necessary to go into this hospital for completion of the job?' A. 'I felt the entire contract or order of the good was necessary.'

> Q. 'You knew when you made the guaranty that in order for these men to complete this contract which they had assigned to you gentlemen as special security for $4,700 worth of loans, that they had to have this shipment from the Mott Co., in order to complete this job?' A. 'It seems so.'
>
> Q. 'You have no objection to that statement?' A. 'It seems that way to me.'"

The Mott Company accepted the guaranty and shipped the goods and have done all necessary acts to keep the guaranty alive.

As directly affecting the question before the Court, we especially call the Court's attention to the fact that although the general contractor, McGhee, had in writing agreed to make all checks which would have amounted to $7,800 to the First National Bank, that the bank *for some absolutely undisclosed reason* adopted the course of allowing the Kaiser Company to collect the money for the contract (ff. 97-6) and that the bank actually ~~exercised~~ a written waiver (Ex. 5, f. 230) *by which it permitted checks amounting to $5,468 to be paid direct to Kaiser Co., instead of being paid to the bank.* The cashier, in this connection, testified (f. 93) that it was the intention of the bank in executing this paper to agree to and ratify the fact that this large sum of money which would have been more than sufficient to have paid the Mott Company's bill, which the bank had guaranteed, be paid to the Kaiser Co., instead of to the bank.

In addition thereto, it appears (ff. 97-8) that there remains the sum of $1,373.28, which, although McGhee had agreed to make all checks to the bank, the bank has by mere inaction allowed McGhee, in part to pay out for Kaiser Company's benefit (f. 144), and in part simply to retain.

It appears that the bank received direct, on account of the contract, check for the sum of $1,105.28. In other words, *the bank has been the direct recipient* from the contract, for the completion of which the plumbing fixtures were necessary, *of the sum of $1,105.28. It voluntarily waived its right to receive $5,408*, and it has neglected to force McGhee to pay in $1,373.28.

*It has had ample opportunity completely and fully to protect its guarantee to the Mott Company*, but for some reason, which it has not seen fit to explain, although its president and cashier were both on the witness stand, it has allowed a great deal more money than the amount of the bill of the Mott Company ($2,365.50) to slip away from it.

Both the Circuit Court and the Supreme Court of South Carolina have decided all issues in favor of this respondent and given judgment for the full amount claimed, with interest.

The action, under a stipulation (f. 59) signed by both defendants, was brought against Kaiser Company and First National Bank jointly. The verdict was rendered jointly and against both defendants. The bank alone petitions herein.

## AUTHORITIES.

*Citizens Central National Bank v. Appleton*, 216 U. S., 196, 83 N. E., 471, 12 R. C. L., 1081.

*Peoples Bank v. Manufacturers National Bank*, 101 U. S., 181.

*Ellis v. Citizens National Bank*, 6 Am. L. Rep., 166.

*Hitchcock v. Galveston*, 96 U. S., 351.

*American National Bank v. National Wall Paper Co.*, 77 Fed. Rep., 85.

*First National Bank v. Greenville Oat Co.*, 60 S. W., 828.

Barnes Fed. Ct., 1919, Sec. 9161.

*National Bank v. National Exchange Bank*, 92 U. S., 127.

*Western National Bank v. Armstrong*, 152 U. S., 231.

*Clement National Bank v. Vermont*, 231 U. S., 150.

*California v. Kennedy*, 167 U. S., 367.

*National Bank of Ottawa v. Converse*, 200 U. S., 425.

*Merchants Bank v. Wehrmann*, 202 U. S., 300.

*Miller v. King*, 223 U. S., 510.

## ARGUMENT.

As we understand it, this Court will uphold the decision of the Supreme Court of South Carolina, even though a Federal question may be incidentally involved, if the facts as found by the South Carolina Court present any independent reasoning, aside from the Federal question, by which the decision below can be upheld. *Murdock v. Memphis*, 20 Wall., 625.

## PETITIONER'S POINT 1.

The burden of petitioner's argument seems to be that the present action is upon the guaranty direct; that the guaranty is *ultra vires* and particularly that the bank has received a benefit less than the amount of the guaranty, and hence that no recovery can be had.

The argument inferentially admits that if the bank receives or is chargeable with a benefit equal to the amount of the guaranty, that the guaranty would be good. We shall endeavor to show the Court that these are the facts; hence, that the inherent validity of the guaranty is not involved and that no Federal question as to the construction of the National Banking Act is necessarily involved, but that the decision of the Supreme Court of South Carolina can

be sustained without passing upon the validity of the guaranty.

What did the bank get out of the transaction, and what is it chargeable with? As we have pointed out, the Supreme Court of South Carolina has held that the bank received $1,105.28, and that it could have gotten, but waived the receipt, and hence, as between it and the Mott Company, is responsible for $5,468.

We submit that the decision of this Court in *Citizens Central National Bank v. Appleton, Receiver*, 216 U. S., 196, is directly in point.

An examination of the decision of the Court of Appeals of New York, found in 83 N. E., 471, reveals the fact that one Samuels owed the National Bank $10,000 and that with the guaranty of the National Bank, he borrowed from the Cooper Exchange Bank $12,000, the National Bank receiving the $10,000 that Samuels owed it. Samuels failed to pay and the National Bank plead *ultra vires*.

A direct action upon the debt was brought in New York upon a complaint which is very similar to the one in the present action. The National Bank demurred to the complaint claiming that no direct recovery could be had against it, and that the guaranty was *ultra vires*. The Supreme Court of New York sustained the demurrer, but the Court of Appeals reversed this decision. The matter then went to this Court which cited numerous authorities to the effect that a general guaranty is *ultra vires*, but the Court held (after plaintiff's counsel had conceded that a recovery could not be had for more than $10,000) that in that action which was a direct action at law, a recovery against the National Bank would be sustained. The Court said:

> "It is entirely clear that the judgment against the Bank * * * was consistent with sound legal principles

> and *was intrinsically right* even if the guaranty in question was beyond the power of the guaranteeing bank, under the National Banking Laws. Whatever may be said as to the validity of the written guaranty, now alleged to be illegal, *the judgment can be supported* as based wholly on the implied contract, which made it the duty of the Ceneral National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the lender in execution of the agreement made by the former with the borrower." (Italics mine.)

We submit that the result of this litigation is that the plaintiff therein voluntarily waived the right to recover more than the $10,000 that the National Bank actually got; hence, the Supreme Court of the United States did not pass upon the question as to whether more money can be recovered than the amount directly traceable to the National Bank, but the Court did absolutely establish the fact that a *recovery* may be had for such an amount as is chargeable against the bank.

This, indeed, is practically admitted by the petitioner herein, except for the fact that it contests the form of the present action.

Now, in view of the facts as found by the Supreme Court of South Carolina, we submit that the present case comes squarely up to the Appleton case. We submit that the Supreme Court of South Carolina has found that the record absolutely supports the finding that the First National Bank of Aiken actually received benefits to the extent of $1,105.28 in cash; that it waived payments amounting to $5,468, and that it has wilfully refrained from availing itself of the right to force McGhee to pay a balance of $1,373.28. Hence, we submit that the First National Bank of Aiken is

chargeable with the whole of $7,800, which is in excess of the amount due to Mott Co.

*As between the bank and the Mott Company, the bank stands in the position of a guarantor which has taken a security available to it alone.* As is said in 12 R. C. L., p. 1081:

> "A guarantor, like other contractual parties is not required to insist upon all his legal rights, but may waive his rights either as to the performance of, or as to the avoidance of, a contract."

The guarantor may waive notice of acceptance, notice of default, the substantial change of a contract or many other things, *but we submit that this is a personal privilege to the guarantor which it personally may waive, but which it may not waive to the detriment of a third party.* In short, we submit that the First National Bank of Aiken must be held to be responsible for the whole of the $7,800 which it could have gotten, but which it has failed to get, and this being true, that it is clearly responsible under this guaranty, with no Federal question arising.

But the petitioner argues that a direct action has been brought, and that as they claim that the guaranty is *ultra vires*, that an action for money had and received must have been brought. To this we answer:

(a) That in the Appleton case, *supra*, a complaint very similar to that in the present case was brought. It appeared incidentally in the trial of the case that the bank had gotten as much as $10,000 and the Supreme Court of the United States said that the judgment rendered "was consistent with sound legal principles and was intrinsically right, even if the guaranty in question is beyond the powers of the guaranteeing bank * * * the judgment can be supported as based wholly on the implied contract."

(b) The defendant's pleading herein made the issue in this case practically one upon an implied ~~power~~ promise. The petitioner has shown in its brief that if it desired to test solely the naked question of the validity of the guaranty, it should have demurred. It failed to demur, but answered, setting up not only the alleged invalidity of the guaranty under the National Bank Act, but also setting up that the guaranty was invalid because of representations of the plaintiff and on account of the alleged delay in the giving of notice to default by the plaintiff, and caused the Court to charge the jury (f. 353):

> "The jury is charged that when a National Bank cashier or any officer of the bank makes a guaranty of goods, wares and merchandise, the bank can refuse payment thereupon when it will be improper or unjust to the bank or stockholders or depositors to perform unless the guaranty was made for the protection of its own rights or as an incident to the transaction of its own business."

In other words, the defendant by its acts in the trial of the case, did not stand wholly upon the alleged *ultra vires* of the guaranty, but brought in testimony so as to bring the question of the benefit accruing to the bank in issue,—in other words, the issue of the "implied promise" was brought prominently into the case by the bank.

(c) Further, we submit that as the action was pending in a State Court, and not a Federal Court, *that the approval of the form of the action by the Supreme Court of South Carolina is controlling.*

Again, we submit that the decisions of the Supreme Court of South Carolina can be upheld on the theory *that the bank was by assignment the owner of the contract* to put in

the plumbing; that it had to have the fixtures in order to get the work done and make the contract worth anything, and that hence, the act of the purchase of the fixtures was virtually the acts of the bank itself.

This position is directly upheld by the decision of the Supreme Court of the United States in the case of *Peoples Bank v. Manufacturers National Bank*, 101 U. S., 181.

In this decision it appears that a customer of a National Bank delivered to it ten promissory notes to be negotiated to the plaintiff pursuant to a prior agreement between the customer and the said National Bank, to the effect that the latter should negotiate the notes and apply the proceeds to the indebtedness due the bank; upon this being done the bank guaranteed the notes and received the money. It was held by this Honorable Court that the bank was liable for the guaranty, although the notes were the notes of a customer.

The same general doctrine is further upheld by a recent decision of the Supreme Court of New Mexico, in the case of *Ellis v. Citizens National Bank*, 6 ~~L. R. A.~~, 166. This decision reviews practically every authority available upon this question, and is the most recent decision upon the general question involved that has come to our attention. The Court said:

> "The bank was hard-pressed for money. Humble owed it past due obligations which he was unable to meet. It put him forward as a borrower for the purpose of procuring money and gave a written guarantee for the repayment of the loan to be made to Humble. The proceeds of the loan were all received by the bank and converted to its use. Under such circumstances we think, beyond question, that the contract was not *ultra vires*, and the bank is liable for the same."

Now, apply these two decisions to the present case, and we find under the facts as determined by the Supreme Court of South Carolina that the National Bank of Aiken was the real owner of the contract in question. That as in the Peoples Bank case, decided by this Honorable Court, the said National Bank of Aiken was actuallly acting in its own behalf in making the guaranty and has become chargeable with the fruits of the contract, and as the Supreme Court of New Mexico has put it, the National Bank of Aiken "put forward" the Kaiser Company to purchase the plumbing materials, for the purpose of making the contract valuable, and we submit that the purchase of the plumbing materials under those circumstances was as much the act of the First National Bank of Aiken as in the other two decisions above set out.

Finally, upon this point, we submit that there is eminent authority for the further position that if there be any benefit whatsoever to the bank accruing from the transaction, that the bank is estopped from claiming *ultra vires*.

Upon this point we shall content ourselves simply with citing a few authorities, principally by Federal Courts. In *Hitchcock v. Galveston*, 96 U. S., 351, in discussing the doctrine of *ultra vires*, as applying to a corporation, this Court said:

> "Having received benefits at the expense of the other contracting party it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

In *American National Bank v. National Wall Paper Co.*, 77 Fed. Rep., 85, the Circuit Court of Appeals, in holding

the guaranty of a National Bank to be valid, in a case in which said National Bank, in order to collect a debt, had guaranteed a wall paper bill of a corporation which it had created in order to recoup a threatened loss, said, approving the language of Thompson on Corporations:

> "The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers and has received the fruits and benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

In *First National Bank v. Greenville Oil Co.*, 60 S. W., 828, the Supreme Court of Texas in a case in which a guaranty had been made by a National Bank of feed bill, upheld the guaranty and gave judgment against the bank for an amount which was far in excess of the amount that the bank received out of the transaction.

This doctrine that a guaranty made by a bank for the protection of its own rights and out of which it receives a benefit, renders the guaranty valid, is established in South Carolina in the case of *Ayer v. Hughes*, 87 S. C., 387.

Of the cases cited by petitioner, in the *Bank v. Smith* and *Bowens v. Needles*, bank cases, there *was no benefit* whatever coming to the banks, while the De la Vergne case does not involve a question of guaranty.

## PETITIONER'S POINT 2.

Was the guaranty *ultra vires*, under the circumstances of this case?

The National Banking Act confers upon National Banks (Barnes' Fed. Code 1919, Sec. 9161) the right "to exercise

by its board of directors, or duly authorized officers or agents subject to law, *all such incidental powers* as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes * * * by loaning money on personal security. * * * "

No direct inhibition against making a guaranty exists. Incidental powers of the bank have been rather liberally construed by this Court in *National Bank v. National Exchange Bank*, 92 U. S., 127:

> "Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. * * * This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met and debts due to it collected or secured. *The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. * * * Banks may do, in this behalf, whatever natural persons could do under like circumstances.*"

The foregoing language is quoted with approval in *Western National Bank v. Armstrong*, 152 U. S., 231, and in *Clement National Bank v. Vermont*, 231 U. S., 140.

We submit that the *guaranty herein was not ultra vires, because as incidental to the power to loan money on personal security, the bank might do what was necessary, even though it incurred a liability, to make the personal security available and valuable to it.*

This proposition, we submit, is supported by the line of decisions of this Court, which established the doctrine that

although a National Bank is not given the authority to acquire the stock of another corporation, that if it takes such stock as collateral security to a loan, and if afterwards the loan is unpaid, then the bank may buy in the stock and become its owner, although purchasing stock is not permitted by the National Bank Act; and, further, and especiallly, that having become its owner, it becomes legally subject to stockholders' liability and may be sued in a direct action should the corporation whose stock it has acquired fail, for the statutory stockholders' liability.

We quote from *California v. Kennedy*, 167 U. S., 367:

> * * * "It is settled that the United States Statutes relative to National Banks constitute the measure of the authority of such corporations and that they cannot rightfully exercise any powers except those expressly granted, or *which are incidental* to carrying on the business for which they are established *Logan County Bank v. Townsend*, 139 U. S., 67, 73. No express power to acquire the stock of another corporation is conferred upon a National Bank, but it has been held that, *as incidental to the power to loan money on personal security* a bank may, in the usual course of doing business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S., 628. So, also, a National Bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness."

In this decision the English case of the Royal Bank of India is quoted with approval to the effect that "as inci-

dental to the power to advance money on deposit of shares of stock, a corporation *might do such acts as were reasonable and proper to make the security available.*"

This doctrine has been recognized repeatedly by the Supreme Court of the United States. See *National Bank of Ottawa v. Converse*, 200 U. S., 425; *Merchants Bank v. Wehrmann*, 202 U. S., 300.

We submit that the gist of the doctrine is simply that the bank, in the exercise of its incidental power and in the exercise of a sound business prudence, *may do what is necessary and proper to render the security valuable and available.*

Applying this doctrine to the present case, we submit that as the bank had taken the contract between McGhee and the Kaiser Co., as collateral security for a series of loans, that by the same course of reasoning it was within the incidental power of the bank to follow the sensible course when it found that it was necessary in order to get the fixtures and fittings that were essential for the completion of the plumbing job, to guarantee the order for the plumbing fixtures in order to make the contract which had been assigned to it as collateral security worth something.

Along the same general line, we cite the decision of this Honorable Court in the case of *Miller v. King*, 223 U. S., 510.

In this case a judgment had been assigned to a National Bank as security for a loan which was not paid at maturity. The bank brought action upon the judgment styling itself the trustee of the judgment creditor. The defendant took the position that a National Bank could not act as trustee. The Supreme Court said:

> "A National Bank cannot act as technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage,

not take property to be held for the wife, of the grantor, with remainder to his children, but under Rev. Stat., Sec. 5136, 'It may exercise all such incidental powers as shall be necessary to carry on banking,' and it may, therefore, act as a fiduciary and occupy a trust relation *in matters connected with that business. * * * At the time of the transfer no suit was contemplated*, and, indeed, none was necessary, because the money was immediately paid by Porter. *Suit only became necessary* when the amount collected by Miller was later improperly paid over by him to the Moss Co. There is nothing in this transaction which was so disconnected with the banking business as to make it in violation of Rev. Stat., Sec 5136, even if the defendant could raise such a question. *Kerfoot v. Bank*, 218 U. S., 281. *The laws of Oregon permitted an action to be maintained in its own name.*"

We submit that the gist of this decision is simply that after the bank has taken a personal security as collateral to a loan, *that it may do those things incidental to the collection of its money which are necessary to make the security available and valuable.*

Along the same general line is the case of *Clement National Bank v. Vermont*, 231 U. S., 140, in which the act of a National Bank in agreeing with the State of Vermont that it would return and pay taxes on the deposits of customers, was upheld when the bank endeavored to repudiate it, as being an incident to the banking business, although the bank by doing so incurred a liability not contemplated by the National Banking Act.

Finally, it is to be noted that the position taken before the Supreme Court of South Carolina against the validity of the guaranty because the same was not passed upon by the

board of directors, has not been pressed in this Court, and is not now before this Court. Ample authority could be cited if the same were necessary, upon this point.

It is respectfully submitted that there is not sufficient ground for granting the writ of *certiorari* in this case.

D. S. HENDERSON,
Respondent's Attorney.

P. F. HENDERSON,
Of Counsel.

November 2, 1920.

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# Supreme Court of the United States

OCTOBER TERM, 1920.

No. [redacted]159

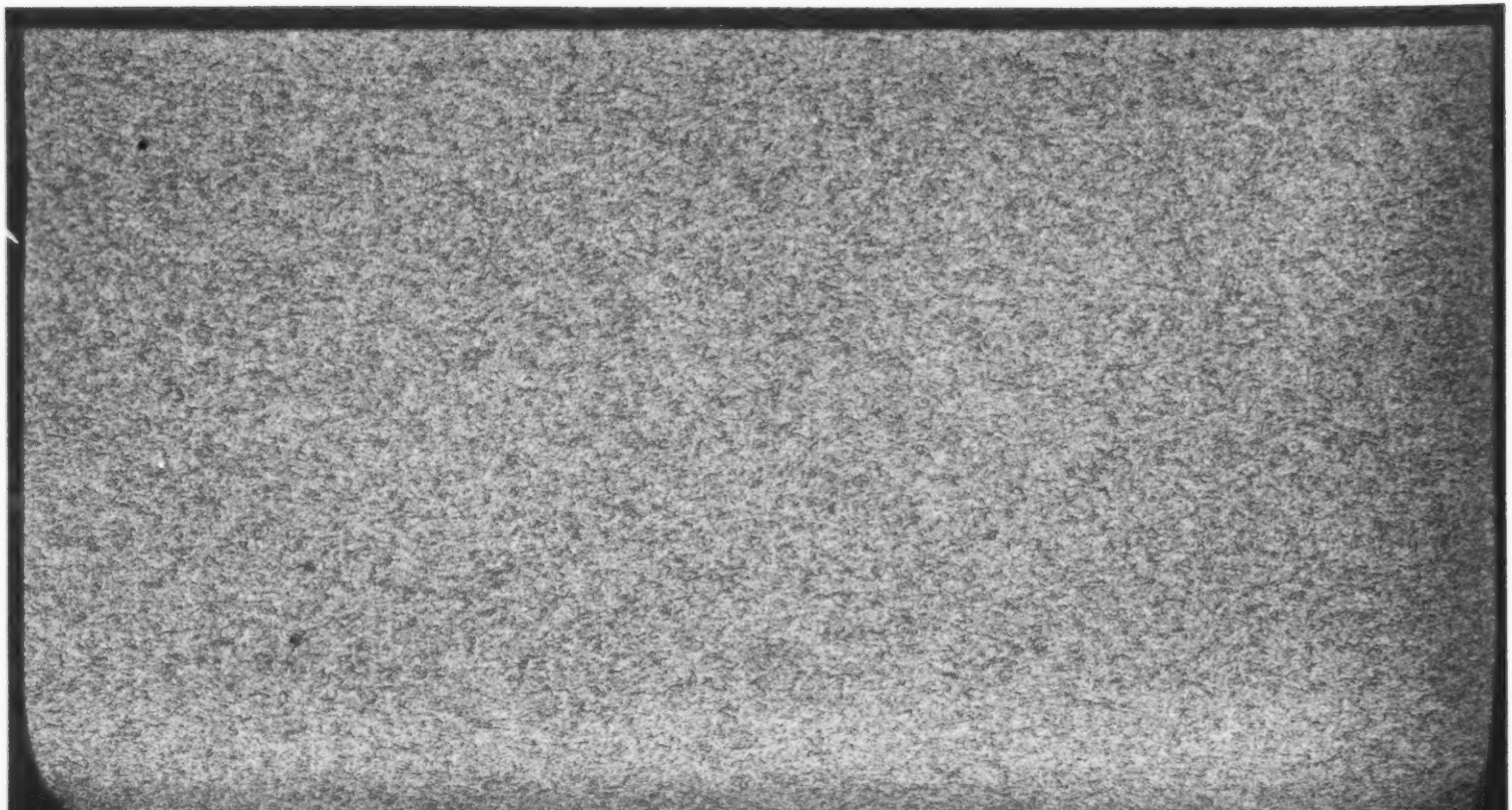
THE FIRST NATIONAL BANK OF AIKEN
Petitioner,

vs.

THE J. L. MOTT IRON WORKS, Respondent.

## Respondent's Brief

A. M. LUMPKIN, Attorney for Respondent.
P. F. HENDERSON, of Counsel.



# Supreme Court of the United States

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## No. 594

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## Respondent's Brief

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A. M. LUMPKIN, Attorney for Respondent.
P. F. HENDERSON, of Counsel.

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### STATEMENT.

During 1916 McGhee & McGhee were building a hospital in Aiken. They awarded the contract for furnishing and installing the plumbing and heating apparatus and fixtures to the Kaiser Co., which concern was not financially responsible. The contract is set out at folio 57 of the Transcript of Record. All folio references made herein are to such Transcript.

The testimony shows that this contract, although undated upon its face, was entered into on the 16th day of August, 1916 (f20), and on that day it was assigned to the First National Bank (f58), and upon the same day, McGhee, the contractor, as part and parcel of the transaction wrote on the back and signed the following endorsement:

> "We hereby agree to the above transfer and agree to make all checks payable to the above named bank on this contract."

The cashier of the bank was summoned and placed on the witness stand by the respondent. The Court is requested to read over his testimony in full (ff. 16-26). The result of the same is that at the time the contract was assigned that the bank agreed to make to Kaiser Company (f. 22) a "running loan," and took this contract as collateral security therefor; that during the fall it loaned to Kaiser Co., thereupon, as much as $4,700, some of which was repaid, but that when Dec. 2d, 1916, arrived, a considerable amount was still due to the bank by Kaiser Co.; and that since this date other loans have been made upon the same security, as evidenced by the fact that checks received by the bank as a result of this transaction, after said date, has not been sufficient completely to liquidate the line of credits.

On Dec. 2, 1916, the guaranty was made to the Mott Company by a telegram of the bank. The cashier's testimony shows that when this date arrived the bank realized that in order for the contract to be completed, which would make the money available, and the contract worth something as security, that it was necessary to make the guaranty. The following is the testimony of the cashier on this point.(ff. 21):

> "Q. 'You knew that lavatories, water tanks, and all kinds of plumbing fixtures were necessary to go into this hospital for completion of the job?' A. 'I

felt the entire contract or order of the goods was necessary'.

Q. 'You knew when you made the guarantee that in order for these men to complete this contract which they had assigned to you gentlemen as special security for $4,700 worth of loans, that they had to have this shipment from the Mott Co., in order to complete this job?' A. 'It seems so'.

Q. 'You have no objection to that statement?' A. 'It seems that way to me'."

The Mott Company accepted the guaranty and shipped the goods and have done all necessary acts to keep the guaranty alive.

As directly affecting the question before the Court, we especially call the Court's attention to the fact that although the general contractor, McGhee, had in writing agreed to make all checks which would have amounted to $7,800 to the First National Bank, that the bank, **for some absolutely undisclosed reason** adopted the course of allowing the Kaiser Company to collect the money for the contract (f. 24) and that the bank actually exercised a written waiver (Ex. 5, f. 58) **by which it permitted checks amounting to $5,468 to be paid direct to Kaiser Co., instead of being paid to the bank.** The cashier, in this connection, testified (f. 24) that it was the intention of the bank in executing this paper to agree to and ratify the fact that this large sum of money which would have been more than sufficient to have paid the Mott Company's bill, which the bank had guaranteed, be paid to the Kaiser Co., instead of to the bank.

In addition thereto, it appears (f. 25) that there remains the sum of $1,373.28, which, although McGhee had agreed to make all checks to the bank, the bank has by mere inaction allowed McGee, in part to pay out for Kaiser Company's benefit (f144), and in part simply to retain.

It appears that the bank received direct, on account of the contract, check for the sum of $1,105.28. In other words, **the bank has been the direct recipient** from the contract, for the completion of which the plumbing fixtures were necessary, **of the sum of $1,105.28. It voluntarily waived its right to receive $5,468**, and it has neglected to force McGhee to pay in $1,373.28.

**It has had ample opportunity completely and fully to protect its guarantee to the Mott Company,** but for some reason, which it has not seen fit to explain, although its president and cashier were both on the witness stand, it has allowed a great deal more money than the amount of the bill of the Mott Company ($2,365.50) to slip away from it.

Both the Circuit Court and the Supreme Court of South Carolina have decided all issues in favor of this respondent and given judgement for the full amount claimed, with interest.

The action, under a stipulation (f. 15) signed by both defendants, was brought against Kaiser Company and First National Bank jointly. The verdict was rendered jointly against both defendants. The bank alone petitions herein.

## AUTHORITIES.

Murdock vs. Memphis, 20 Wall 625.
Citizens Central National Bank vs. Appleton, 216 U. S., 196, 83 N. E., 471, 12 R. C. L., 1081.
Peoples Bank vs. Manufacturers National Bank, 101 U. S., 181.
Ellis vs. Citizens National Bank, 6 Am. L. Rep., 166.
Hitchcock vs. Galveston, 96 U. S., 351.
American National Bank vs. National Wall Paper Co., 77 Fed. Rep., 85.

First National Bank vs. Greenville Oat Co., 60 S. W., 828.
Barnes Fed. Ct. 1919, Sec. 9131.
National bank vs. National Exchange Bank, 92 U. S., 127.
Western National Bank vs. Armstrong, 152 U. S., 231.
Clement National Bank vs. Vermont, 231 U. S., 150.
California vs. Kennedy, 167 U. S., 367.
National Bank of Ottaway vs. Converse, 200 U. S., 425.
Merchants Bank vs. Wehrmann, 202 U. S., 300.
Miller vs. King, 223 U. S. 510.

## ARGUMENT.

As we understand it, this Court will uphold the decision of the Supreme Court of South Carolina, even though a Federal question may be incidentally involved, if the facts as found by the South Carolina Court present any independent reasoning, aside from the Federal question, by which the decision below can be upheld. **Murdock vs. Memphis** 20 Wall., 625.

## PETITIONER'S POINT 1.

The burden of petitioner's argument seems to be that the present action is upon the guaranty direct; that the guaranty is **ultra vires** and particularly that the bank has received a benefit less than the amount of the guaranty, and hence that no recovery can be had.

The argument inferentially admits that if the bank receives or is chargeable with a benefit equal to the amount of the guaranty, that the guaranty would be good. We shall endeavor to show the Court that these are the facts; hence, that the inherent validity of the guaranty is not involved and that no Federal question as to the construction of the National Banking Act is necessarily involved, but that the decision of the Supreme Court of

South Carolina can be sustained without passing upon the validity of the guaranty.

What did the bank get out of the transaction, and what is it chargeable with? As we have pointed out, the Supreme Court of South Carolina has held that the bank received $1,105.28, and that it could have gotton, but waived the receipt of, and hence, as between it and the Mott Company, is responsible for $5,468.

We submit that the decision of this Court in **Citizens Central National Bank vs. Appleton, Receiver** 216 U. S. 196, is directly in point.

An examination of the decision of the Court of Appeals of New York, found in 83 N. E., 471, reveals the fact that one Samuels owed the National Bank $10,000 and that with the guaranty of the National Bank, he borrowed from the Cooper Exchange Bank $12,000, the National Bank receiving the $10,000 that Samuels owed it. Samuels failed to pay and the National Bank plead **ultra vires.**

A direct action at law upon the debt was brought in New York upon a complaint which was in effect very similar to the one in the present action. The National Bank demurred to the complaint claiming that no direct recovery could be had aginst it, and that the guaranty was **ultra vires.** The Supreme Court of New York sustained the demurrer, but the Court of appeals reversed this decision. The matter then went to this Court which cited numerous authorities to the effect that a general guaranty is **ultra vires,** but the Court held (after plaintiff's counsel had conceded that a recovery could not be had for more than $10,000) that in that action which was a direct action at law, a recovery against the National Bank would be sustained The Court said:

> "It is entirely clear that the judgement against the bank * * * was consistent with sound legal principles and **was intrinsically** right even if the guaranty in

> question was beyond the power of the guaranteeing bank, under the National Banking Laws. Whatever may be said as to the validity of the written guaranty, now alleged to be illegal, **the judgement can be supported** as based wholly on the implied contract, which made it the duty of the Central National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the lender in execution of the agreement made by the former with the borrower.
> (Italics mine.)

We submit that the result of this litigation is that the plaintiff therein voluntarily waived the right to recover more than the $10,000 that the National Bank actually got; hence, the Supreme Court of the United States did not pass upon the question as to whether more money can be recovered than the amount directly traceable to the National Bank, but the Court did absolutely establish the fact that a **recovery** may be had for such an amount as is chargeable against the bank.

This, indeed, is practically admitted by the petitioner herein, except for the fact that it contests the form of the present action.

Now, in view of the facts as found by the Supreme Court of South Carolina, we submit that the present case comes squarely up to the Appleton case. We submit that the Supreme Court of South Carolina has found that the record absolutely supports the finding that the First National Bank of Aiken actually received benefits to the extent of $1,105.28 in cash; that it waived payments amounting to $5,468, and that it has wilfully refrained from availing itself of the right to force McGhee to pay a balance of $1,373.28. Hence, we submit that the First National Bank of Aiken is chargeable with the whole of $7,800, which is in excess of the amount due to Mott Co.

**As between the bank and the Mott Company, the bank**

**stands in the position of a guarantor which has taken a security available to it alone.** As is said in 12 R. C. L., p. 1081.

> "A guarantor, like other contractual parties is not required to insist upon all his legal rights, but may waive his rights as to the performance of, or as to the avoidance of, a contract."

The guarantor may waive notice of acceptance, notice of default,the substantial change of a contract or many other things, **but we submit that this a personal privilege of the guarantor which it personally may waive, but which it may not waive to the detriment of a third party.** In short, we submit that the First National Bank of Aiken must be held to be responsible for the whole of the $7,800 which it could have gotton, but which it has failed to get, and this being true, that it is clearly responsible under this guaranty, with no Federal question arising.

But the petitioner argues that a direct action has been brought, and that as they claim that the guaranty is **ultra vires**, that an action for money had and received must have been brought. To this we answer:

(a) That in the Appleton case, supra, a complaint very similar to that in the present case was brought. It appeared incidentally in the trial of the case that the bank had gotten as much as $10,000 and the Supreme Court of the United States said that the judgement rendered "was consistent with sound legal principles and was intrinsically right, even if the guaranty in question is beyond the powers of the guaranteeing bank * * * the judgement can be supported as based wholly on the implied contract."

(b) The petitioner's procedure herein made the issue in this case practically one upon an implied promise. The petitioner has shown in its brief that if it desired to test solely the naked queston of the validity of the guaranty,

it should have demurred. It failed to demur, but answered, setting up not only the alleged invalidity of the guaranty under the National Bank Act, but also setting up that the guaranty was invalid because of representations of the plaintiff and on account of the alleged delay in the giving of notice to default by the plaintiff, and caused the Court to charge the jury (f. 353):

> "The jury is charged that when a National Bank cashier or any officer of the bank makes a guaranty of goods, wares and merchandise, the bank can refuse payment thereupon when it will be improper or unjust to the bank or stockholders or depositors to perform unless the guaranty was made for the protection of its own rights or as an incident to the transaction of its own business.

In other words, the defendant by its acts in the trial of the case, did not stand wholly upon the alleged **ultra vires** of the guaranty, but brought in testimony so as to bring the question of the benefit accruing to the bank in issue, —in other words, the issue of the "implied promise" was brought prominently into the case by the bank.

(c) The complaint alleges (f. 3) "The defendant, First National Bank, in writing **guaranteed and agreed legally and with due authority** to become responsible for and pay, **in consideration of the sale and delivery of said merchandise, fixtures and goods to the Kaiser Company, the whole of said bill.**"

In South Carolina pleading are by Statute to be liberally construed with a view to establish justice between the parties (Code of 1912 Section 209) and if there is any indefiniteness in a pleading the opposite party should move to have the same made more definite (Section 210).

Viewed in the spirit of the South Carolina Code, we submit that the foregoing allegations are fully as broad as the allegation in the Appleton case, supra, and are

amply sufficient to bring into the case whatsoever may have been necessary to make the guarantee **legal** and binding, including proof of the **consideration** which actually moved to the Bank when it made the guarantee, which otherwise might be held to be **ultra vires.**

(d) Further we submit that as the action was pending in the State Court and not a Federal Court, **that the approval of the form of action by the Supreme Court of South Carolina is controlling.**

Referring incidentally to the case of Godfrey vs. Lumber Co., 88 S. C., 132, cited in petitioner's brief to the effect that the established law in South Carolina is that where a plaintiff has two possible remedies that he will be strictly required to elect which he will pursue, we ask to call the attention of the Court to the fact that this decision is rendered by a divided Court.

The Supreme Court of South Carolina at the time that this decision was rendered consisted of four Justices. Mr. Justice Hydrick delivered the opinion from which the excerpt quoted is taken. He alone held the doctrine stated therein and relied upon by counsel for the petitioner herein.

Mr. Justice Gary voted with Judge Hydrick for an affirmance of the judgement below, but on an entirely different ground. He specifically held that in his opinion the plaintiff could not recover on the evidence adduced upon either of the plaintiff's claims, and he did not hold with Judge Hydrick that the plaintiff would be held to a strict election.

The dissenting opinion was rendered by Mr. Justice Charles A. Woods, now a distinguished member of the Federal Circuit Court of Appeals of the Fourth Circuit. Chief Justice Jones concurred in this opinion. Judge Woods (page 152) the Chief Justice concurring with him, said:

> "Even if the action for rescission and the proof does not warrant that relief, the plaintiff may have the lesser relief of abatement of the price if the evidence is sufficient to show that relief to be equitable. The relief to be granted not being controlled by the prayer of the complaint the Court may grant any relief less than that demanded in the complaint within the scope of the pleadings and warranted by the evidence. Miller vs. Hughes, 33, S. C., 530, 12 S. E., 419; Guerard vs. Jenkins ,80 S. C., 223, 61 S. E., 258."

In the case of Guerard vs. Jenkins, supra, Mr. Justice Woods, again speaking for the Court, held:

> "A complaint stating facts which if proven would entitle plaintiff to any relief, is not demurrable on the ground that the facts alleged show that plaintiff is entitled to the relief prayed for."

This, we submit, is the established doctrine in South Carolina, viz: that a complaint shall be construed liberally and the plaintiff shall be afforded such relief as he is entitled to with no strict adherence to forms, and in the instant case, the Supreme Court of South Carolina, with the facts before it, showing that the defendant had actually received $1,105.28 in cash as a result of the guarantee, and had waived the right to recive $5,468.00, did not see fit to hold the plaintiff to a strict accountability, as upon a suit strictly upon the guarantee, but with the undoubted facts that much more money was traceable to the bank than the amount sued for, the Supreme Court of South Carolina saw fit not to object to this method of procedure but sustained the suit as brought.

We submit that this action upon the part of the Supreme Court of South Carolina, which had the regulation of the form of the action and of the kind of remedy to be given, is conclusive of the question raised by the peti-

tioner to the effect that the action should in form have been for money had and received.

Again, we submit that the decisions of the Supreme Court of South Carolina can be upheld on the theory **that the bank was by assignment the owner of the contract** to put in the plumbing; that it had to have the fixtures in order to get the work done and make the contract worth anything, and that hence, the act of the purchase of the fixtures was virtually the acts of the bank itself.

This positoin is directly upheld by the decision of the Supreme Court of the United States in the case of **Peoples Bank vs. Manufacturers National Bank,** 101 U. S., 181.

In this decision it appears that a customer of a National Bank delivered to it ten promissory notes to be negotiated to the plaintiff pursuant to a prior agreement between the customer and the said National Bank, to the effect that the latter should negotiate the notes and apply the proceeds to the indebtedness due the bank; upon this being done the bank guaranteed the notes and received the money. It was held by this Honorable Court that the bank was liable for the guaranty, although the notes were the notes of a customer.

The same general doctrine is further upheld by a recent decision of the Supreme Court of New Mexico, in the case of **Ellis vs. Citizens National Bank,** 6 L. R. A., 166. This decision reviews practically every authority available upon this question, and is the most recent decision upon the general question involved that has come to our attention. The Court said:

> "The bank was hard-pressed for money. Humble owed it past due obligations which he was unable to meet. It put him forward as a borrower for the pur-

pose of procuring money and gave a written guarantee for the repayment of the loan to be made to Humble. The proceeds of the loan were all received by the bank and converted to its use. Under such circumstances we think, beyond question, that the contract was not **ultra vires**, and the bank is liable for the same."

Now, apply these two decisions to the present case, and we find under the facts as determined by the Supreme Court of South Carolina that the National Bank of Aiken was the real owner of the contract in question. That as in the Peoples Bank case, decided by this Honorable Court, the said National Bank of Aiken was actually acting in its own behalf in making the guaranty and has become chargeable with the fruits of the contract, and as the Supreme Court of New Mexico has put it, the National Bank of Aiken "put forward" the Kaiser Company to purchase the plumbing materials, for the purpose of making the contract valuable, and we submit that the purchase of the plumbing materials under those circumstances was as much the act of the First National Bank of Aiken as in the other two decisions above set out.

Finally, upon this point, we submit that there is eminent authority for the further position that if there be any benefit whatsoever to the bank accruing from the transaction, that the bank is estopped from claiming **ultra vires.**

Upon this point we shall content ourselves simply with citing a few authorities, principally by Federal Courts. In **Hitchcock vs. Galveston,** 96 U. S., 351, in discussing the doctrine of **ultra vires,** as applying to a corporation, this Court said:

> "Having received benefits at the expense of the other contracting party it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

In **American National Bank vs. National Wall Paper Co.**, 77 Fed. Rep., 85, the Circuit Court of Appeals, in holding the guaranty of a National Bank to be valid, in a case in in which said National Bank, in order to collect a debt, had guaranteed a wall paper bill of a corporation which it had created, in order to recoup threatened loss, said, approving the language of Thompson on Corporations:

> "The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers and has received the fruits and benefits of the contract, and an action is bought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

In **First National Bank vs. Greenville Oil Co.**, 60 S. W. 828, the Supreme Court of Texas in a case in which a guaranty had been made by a National Bank of feed bill upheld the guaranty and gave judgement against the bank **for an amount which was far in excess of the amount that the bank received out of the transaction.**

This doctrine that a guaranty made by a bank for the protection of its own rights and out of which it receives a benefit, renders the guaranty valid, is established in South Carolina in the case of **Ayer vs. Hughes**, 87 S. C., 387.

Of the cases cited by petitioner, in the **Bank vs. Smith** and **Bowens vs. Needles**, bank cases, **there was no benefit** whatever coming to the banks, while the Del la Vergne case does not involve a question of guaranty.

## PETITIONER'S POINT 2.

Was the guaranty **ultra vires**, under the circumstnaces of this case?

The National Banking Act confers upon National Banks (Barnes' Fed. Code 1919, Sec. 9131) the right "to exercise by its board of directors, or duly authorized officers or agents subject to law, **all such incidental powers** as shall be necessary to carry on the buisenss of banking, by discounting and negotiating promissory notes * * * by loaning money on personal security. * * *."

No direct inhibition against making a guaranty exists. Incidental powers of the bank have been rather liberally construed by this Court in **National Bank vs. National Exchange Bank**, 92 U. S., 127:

> "Authority is thus given to transact such a banking business as is specified, and all incidental powers necesary to carry it on are granted * * * This necessarily implies the right of a bank to incur liabilities in regular course of its business, as well as to become the creditor of others. Its own obligations must be met and debts due to it collected or secured. **The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. * * * Banks may do, in this behalf, whatever natural persons could do under like circumstances.**"

The foregoing language is quoted with approval in **Western National Bank vs. Armstrong**, 152 U. S., 231, and in **Clement National Bank vs. Vermont**, 231 U. S., 140.

We submit that the guaranty herein was not ultra vires, because as incidental to the power to loan money on personal security, the bank might do what was necessary, even though it incurred a liability, to make the personal security available and valuable to it.

This proposition, we submit, is supported by the line of decisions of this Court, which established the doctrine that although a National Bank is not given the authority to acquire the stock of another corporation, that if it takes such stock as collateral security to a loan, and if afterwards the loan is unpaid, then the bank may buy in the stock and become its owner, although purchasing stock is not permitted by the National Bank Act; and, further, and especially, that having become its owner, it becomes legally subject to stockholders' liability and may be sued in a direct action should the corporation whose stock it has acquired fail, for the statutory stockholders' liability.

We quote from **California vs. Kennedy**, 167 U. S., 367:

> * * * "It is settled that the United States statutes relative to National Banks constitute the measure of the authority of such corporations and that they cannot rightfully exercise any powers except those expressly granted, or **which are incidental** to carrying on the business for which they are established. **Logan County Bank vs. Townsend**, 139 U. S., 67, 73 No express power to acquire the stock of another corporation is conferred upon a National Bank, but it has been held that, **as incidental to the power to loan money on personal security** a bank may, in the usual course of doing business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. **National Bank vs. Case**, 99 U. S., 628. So, also, a National Bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness."

In this decision the English case of the Royal Bank of

India is quoted with approval to the effect that "as incidental to the power to advance money on deposit of shares of stock, a corporation **might do such acts as were reasonable and proper to make the security available.**"

This doctrine has been recognized repeatedly by the Supreme Court of the United States. See **National Bank of Ottawa vs. Converse**, 200 U. S., 425; **Merchants Bank vs. Wehermann**, 202 U. S., 300.

We submit that the gist of the doctrine is simply that the bank in the exercise of its incidental power and in the exercise of a sound business prudence, **may do what is necessary and proper to render the security valuable and available.**

Applying this doctrine to the present case, we submit that as the bank had taken the contract between McGhee and the Kaiser Co., as collateral security for a series of loans, that by the same course of reasoning it was within the incidental power of the bank to follow the sensible course when it found that it was necessary in order to get the fixtures and fittings that were essential for the completion of the plumbing job, to guarantee the order for the plumbing fixtures in order to make the contract which had been assigned to it as collateral security worth something.

Along the same general line, we cite the decision of this Honorable Court in the case of **Miller vs. King**, 223 U. S., 510.

In this case a judgement had been assigned to a National Bank as security for a loan which was not paid at maturity. The bank brought action upon the judgement styling itself the trustee of the judgement creditor. The defendant took the position that a National Bank could not act as trustee. The Supreme Court said:

> "A National Bank cannot act as a technical trustee and hold land for the benefit of third persons. It

cannot, for example, act as trustee under a railroad mortgage, not take property to be held for the wife, of the grantor, with remainder to his children, but under Rev. Stat., Sec. 5136, 'It may exercise all such incidental powers as shall be necessary to carry on banking,' and it may, therefore act as a fiduciary and occupy a trust relation **in matters connected with that buisness.** * * * **At the time of the transfer no suit was contemplated,** and, indeed, none was necessary, because the money was immediately paid by Porter. **Suit only became necessary** when the amount collected by Miller was later improperly paid over by him to the Moss Co. There is nothing in this transaction which was so disconnected with the banking business as to make it in violation of Rev. Stat. Sec. 5136, even if the defendant could raise such a question. **Kerfoot vs. Bank,** 218 U. S., 281 **The laws of Oregon permitted an action to be maintained in its own name."**

We submit that the gist of this decision is simply that after the bank has taken a personal security as collateral to a loan, **that it may do those things incidental to the collection of its money which are necessary to make the security available and valuable.**

Along the same general line is the case of **Clement National Bank vs. Vermont,** 231 U. S., 140, in which the act of a National Bank in agreeing with the State of Vermont that it would return and pay taxes on the deposits of customers, was upheld when the bank endeavored to repudiate it, as being an incident to the banking business, although the bank by doing so incurred a liability not contemplated by the Natonal Banking Act.

## THE QUESTION OF WHETHER THE BANK IS BOUND BY THE ACTS OF ITS OFFICERS.

Under the facts of this case, which need not be reitera-

ted, we submit that this question is fully covered by the section of Thompson on Corporations, (5258) which is cited and relied on by the Federal Circuit Court of Appeals in **National Bank vs. Wall Paper Co., supra,** as follows:

> "It is a general principle in the law of agency that, where one person assumes, without authority, to make a contract for another, and that other receives the benefit accruing from the contract, and elects to retain them after being possessed of knowledge of the circumstances under which they have been procured from the other contracting party, he is thereby **estopped** from repudiating the contract without restoring the benefits and putting the other part in **statu quo.** This principle is applicable in its fullest sense to corporations, which, from their nature, can act only through the instrumentality of agents."

We wish particularly to suggest that in considering the question of the authority of the officers of the bank, there is a vast difference between an executed contract, such as the present is, and a mere executory contract.

Upon the general subject of the authority of bank cashiers we quote from the following decisions of the United States Supreme Court:

**Merchants Bank vs. State Bank,** 10 Wall., 644-650:

> "Where a party deals with a corporation in good faith—the transaction is not **ultra vires**—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract though such defect or irregularity in fact exists. * * * The cashier is the executive officer through whom the whole financial operations of the bank are

conducted. He receives and pays out its money, collects and pays its debts, and receives and transfers its commercial securities. * * * The directors may limit his authority as they deem proper, but this will not effect those to whom the limitation was unknown."

**Western National Bank vs. Armstrong,** 152 U. S., 352:

"It is true that a corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent, by appropriating and obtaining with the knowledge of the facts the benefits of the contract so made on its behalf."

We submit that there is another principle upon which the bank is bound by the act of its cashier, which he testified and which the jury was justified in believing, was performed after consultation with the president, viz., that the knowledge of these officers was imputed to the bank and that the bank and its officers permitting the Mott Co., with knowledge of the guarantee having been made, to ship its goods, for the benefit of the security held by the bank, precludes the bank and its directors and all concerned from repudiating the guarantee after accepting the check for $1,105.28 on July 7, 1917.

We cite **Amercian National Bank vs. Miller,** 229, U. S. 521:

"This presents another phase of the oft recurring question as to when or how far notice to an agent is notice to its principal. In view of the many decisions on the subject it is unnecessary to do more than to apply one to the facts of this case. If plant, within the scope of his office, had knowledge of a fact **which it was his duty to declare and not to his interest to conceal,** then his knowledge is to be treated as that of the bank. For he is then presumed to have done what

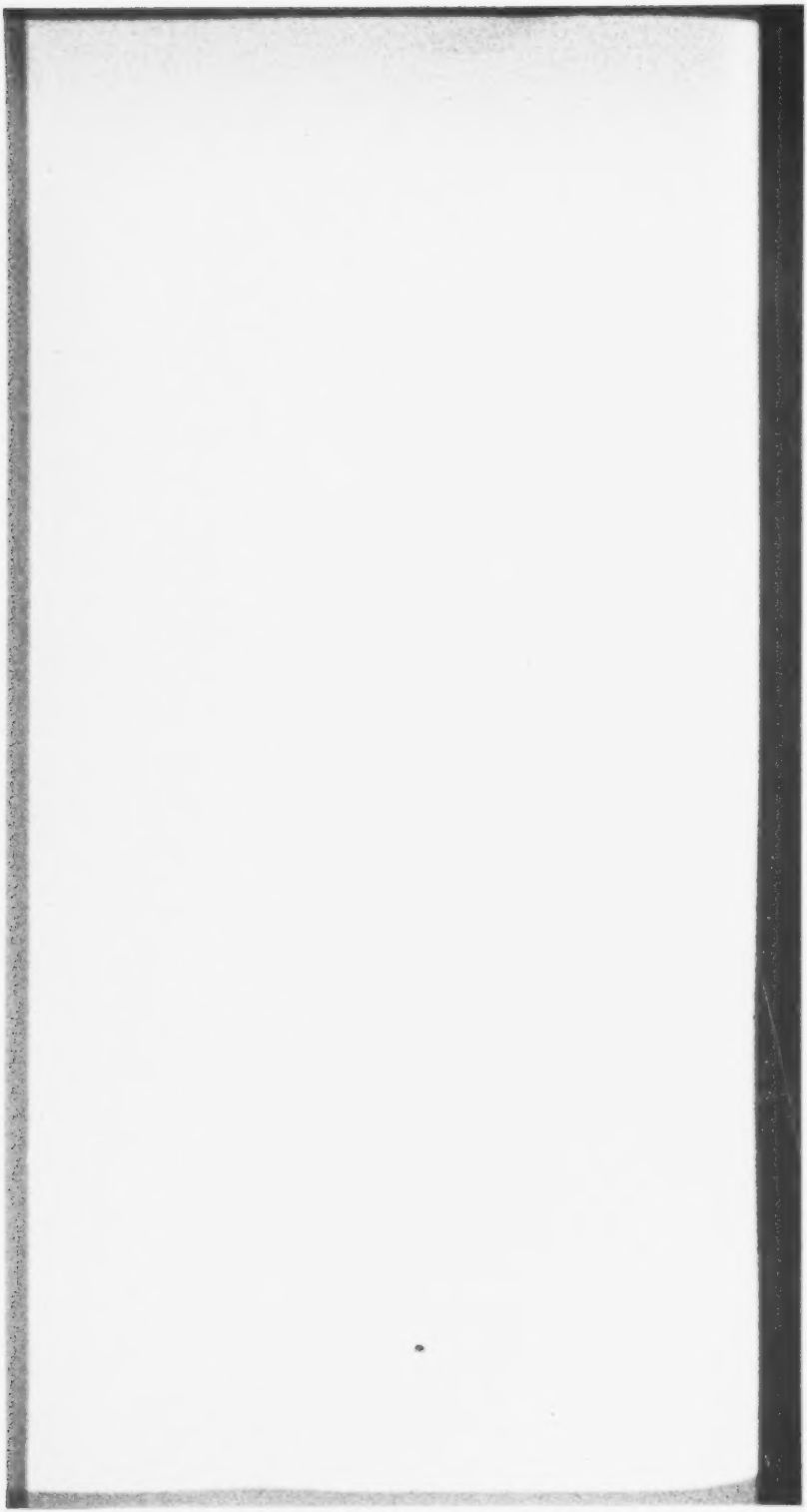
he ought to have done and to have actually given the information to his principle."

Further, we desire particularly to call the Court's attention to the fact that practically all authorities which contend that a corporation is not bound by the act of an unauthorized agent, base the same upon the theory that the person contracting with the bank under such circumstances, should have taken notice of the lack of authority of the agent on account of the fact that he knew that he was dealing with such agent alone, and that it was incumbent upon him to inquire into the agent's authority.

We do not concede the validity of this principle of law, but call the attention of the Court to the fact that in this particular instance that the guarantee to the Mott Co., was not signed by the cashier, but was signed by "First National Bank of Aiken." This gave the Mott Co., no notice of the fact that the cashier and president were acting upon their own initiative, which we submit, is very significant in this inquiry.

Wherefore we respectfully submit that the judgement of the Supreme Court of South Carolina should be affirmed.

A. M. LUMPKIN,
Respondents Attorney.
P. F. HENDERSON,
Of Counsel.



# FIRST NATIONAL BANK OF AIKEN *v.* J. L. MOTT IRON WORKS.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 159. Argued March 10, 1922.—Decided March 20, 1922.

A national bank, having advanced money to one who had contracted to supply labor and material for a building, on the security of his assignment of the contract and of payments to be made under it, guaranteed payment of goods afterwards sold to the contractor, on the faith of the guaranty, and used in the work. *Held:* (a) That whether or not the guaranty was valid as an incident of banking, the bank was liable to the seller, up to its amount, for moneys subsequently arising under the assigned contract which were paid to it or, with its consent, to the contractor; and (b) that, the case having been tried on its merits, the distinction between a recovery on the guaranty and a recovery of the amount so directly or indirectly received on account of it, was purely formal. P. 241.
Affirmed.

CERTIORARI to a judgment affirming a recovery obtained by the respondent on a guaranty made by the petitioner.

*Mr. John F. Williams,* with whom *Mr. William S. Nelson* was on the brief, for petitioner.

*Mr. P. F. Henderson,* with whom *Mr. A. M. Lumpkin* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit against the petitioner upon a written guaranty of payment to the respondent of $2,363.50 for goods sold to the Kaiser Company. The plaintiff, (the respondent,) had a verdict and judgment and the judgment was affirmed by the Supreme Court of the State. The case comes here on the question of the liability of the bank, upon the facts that we shall state.

They are simple. A firm of McGhee and McGhee was building a hospital in Aiken. The firm had contracted with the Kaiser Company for the heating and plumbing, at the price of $7,800, the firm agreeing to pay eighty-five

per cent. of the labor and materials furnished each month and the remaining fifteen at the completion of the system. The Kaiser Company assigned this contract to the bank and the firm agreed to make all checks under the contract payable to the bank. This was done as security to the bank for advances the validity of which is not contested. In the course of performance the Kaiser Company ordered the goods concerned from the respondent, but the respondent required security before it would send them. Thereupon the bank in order to enable the company to complete its contract and thereby to repay the advances that the bank had made gave the guaranty in question. Subsequently the bank received $1,105.28 and might have received much more than the amount of its guaranty although in fact it allowed the McGhees to pay checks for $5,468 to the Kaiser Company, with the result that the Kaiser Company still owes it some money. Therefore the bank is in the position of having realized the benefit to acquire which the guaranty was made, and of having realized it out of the proceeds of the goods that it induced the Iron Company to sell.

In such circumstances, whether the contract is valid or not, the contractor is accountable to the contractee, up to the amount of his undertaking; for the proceeds coming to his hands from the contractee upon the inducement of the contract. *Citizens' Central National Bank* v. *Appleton,* 216 U. S. 196. In this case therefore the plaintiff is entitled to recover the amount for which it has declared, and as the case was fully tried upon the merits, the distinction between a recovery on the guaranty, as having been necessarily incident to the business of banking, and a recovery of the amount received by petitioner on account of the guaranty, becomes purely formal.

*Judgment affirmed.*

Mr. Justice Clarke was absent and took no part in the decision.